

R E P O R T S
 O F
 C A S E S
 ARGUED and DETERMINED
 IN THE
 COURT OF KING'S BENCH

From *Trinity* Term, 27th George III.

T O

Michaelmas Term, 29th George III.

BOTH INCLUSIVE.

By CHARLES DURNFORD AND EDWARD HYDE EAST,
 OF THE TEMPLE, ESQRS.
 BARRISTERS AT LAW.

*Si quid novisti rectius istis,
 Candidus imperti; si non, his utere mecum.*

HORAT.

VOL. II.

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From Trinity Term 1843 to Trinity Term 1844



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By CHARLES DUMFRIES, Esq., Barrister at Law

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LONDON

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JUDGES OF THE COURT
Of King's Bench,

During the Time of these REPORTS,

WILLIAM Earl of MANSFIELD, Lord Chief Justice,
(resigned in *June* 1788.)

LLOYD Lord KENYON, Lord Chief Justice, (appointed
9th *June*, 1788.)

Sir WILLIAM HENRY ASSHURST, Knt.

FRANCIS BULLER, Esq.

Sir NASH GROSE, Knt.

RICHARD PEPPER ARDEN, Esq. Attorney General, (now
Sir RICHARD PEPPER ARDEN, appointed Master of
the Rolls, *July* 1788.)

Sir ARCHIBALD MACDONALD, Knt. Solicitor General,
(appointed Attorney General, *July* 1788.)

Sir JOHN SCOTT, Knt. Solicitor General.

JUDGES OF THE COURT
Of King's Bench

During the time of each R. P. O. T. S.

William, Lord of Mansfield, Lord Chief Justice
(1753-1793)

Lord Mansfield, Lord Chief Justice
(1753-1793)

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INDEX
OF
CASES REPORTED.

A.	Pages.
AIRE and Calder Navigation, the Undertakers of (the King <i>against</i>)	660
Allanfon (Foster <i>against</i>)	479
Allcott (Bennet <i>against</i>)	166
Amery (the King <i>against</i>)	515
Amherst Lord v. Lord Sommers	372
Andr��e v. Fletcher	161
Andrew St. Holborn the Inhabitants of (the King <i>against</i>)	627
Archer (the King <i>against</i>)	270
Arkwright (Crossley <i>against</i>)	603
Atherfold v. Beard	610
Atkinson v. Maling	462
The same v. Matteson	172
Auriol v. Thomas	52

B.	
Bacchus (Lane <i>against</i>)	44
Baker lessor of Maddon v. White	159
Barber (Doe dem. Crisp <i>against</i>)	749
Barber v. Lloyd	513
Barrow (Smith <i>against</i>)	476
b	Beard

INDEX OF CASES REPORTED.

	<i>Pages:</i>
Beard (<i>Atherfold against</i>)	610
Bennett v. Allcott	166
The Same (<i>Cockshott against</i>)	763
Beyer's Assignees v. Ketchmar	45
Bishop of Ely (<i>the King against</i>)	290
Bonafous v. Walker	126
Bond (<i>the King against</i>)	767
Boot (<i>White against</i>)	274
Boothman v. the Earl of Surrey	5
Brest (<i>Scott qui tam against</i>)	238
Brigges, Bart. (<i>Cicel against</i>)	639
Bromfield Lessor of Doe v. Smith	436
Brooke (<i>the King against</i>)	190
Brown (<i>Tindal against</i>)	186
Buchanan (<i>Hall against</i>)	734
The Same v. Parnshaw	745
Buckley's Assignees v. Taylor.	600
Buntz (<i>the King against</i>)	683
Bury (<i>Philips against</i>)	346

C.

Calder Navigation (<i>the King against</i>)	660
Cambridge (<i>the King against the Mayor of</i>)	456
Carflake v. Mapledoram	473
Cater v. West	183
Cazalet (<i>Whitter against</i>)	683
Cicel v. Brigges, Bart.	639
Chertsey (<i>the King against the Inhabitants of</i>)	37
Cheshunt (<i>the King against the Inhabitants of</i>)	623
Church (<i>Lord Lonsdale against</i>)	388
Clare (<i>Doe dem. Coore against</i>)	739
Clements lessor of Doe (<i>Collins against</i>)	498
Cliviger (<i>the King against the Inhabitants of</i>)	263
Cock (<i>Roe against</i>)	257
Cockshott v. Bennett	763
Colchester (<i>the King against the Mayor of</i>)	259
Colkett v. Freeman	59
Collins (<i>Doe dem. Clements against</i>)	498
The	The

INDEX OF CASES REPORTED.

	Pages.
The Same v. Powell	756
Coore lessor of Doe v. Clare	739
Copeland (Doe dem. Ld. Palmerston <i>against</i>)	779
Court (Martin <i>against</i>)	640
Crickett (Ladbroke <i>against</i>)	649
Crisp lessor of Doe v. Barber	749
Crookshanks (Heathcote <i>against</i>)	24
Crossley v. Arkwright	603

D.

Da Costa v. Newnham	407
Davies v. Pierce	53, 125
Deey v. Shee	617
De Hahn v. Hartley	186
Denn dem. Trickett v. Gillot	431
Devon the Men of (Russell <i>against</i>)	667
Dimpsey (the King <i>against</i>)	96
Divine (Page <i>against</i>)	40
Dodd v. Joddrell	235
Doe dem. Crisp v. Barber	749
Doe dem. Coore v. Clare	739
Doe dem. Clements v. Collins	498
Doe dem. Ld. Palmerston v. Copeland	779
Doe dem. Milburne v. Milburne	721
Doe (Roe dem. Wood <i>against</i>)	644
Doe dem. Bromfield v. Smith	436
Doe dem. Hodfsden v. Staple	684
Doe dem. Vessey v. Wilkinson	209
Dore v. Gray	358
D' Oyley (Radcliffe <i>against</i>)	630
Drayton (Masters qui tam <i>against</i>)	496
Drinkwater (Gulliver <i>against</i>)	261
Duberley v. Page	391
Dyche (Fletcher <i>against</i>)	32

E.

Eaton (the King <i>against</i>)	89, 285
Edmondson v. Machell	4
	Edwards

INDEX OF CASES REPORTED.

	<i>Pages.</i>
Edwards v. Harben	587
Elliot (Mardiner <i>against</i>)	746
Ely, the Bishop of (the King <i>against</i>)	290
Emery v. Fell	28
Entwistle v. Shephard	78
Evans (Samuel <i>against</i>)	569
Excise, the Commissioners of (the King <i>against</i>)	381

F.

Fairtitle v. Gilbert	169
Falch's Assignees v. Freeman	59
Farringdon, the Inhabitants of (the King <i>against</i>)	466
Fell (Emery <i>against</i>)	28
Field (Yea Bart <i>against</i>)	708
Filewood (the King <i>against</i>)	145
Fillongley the Inhabitants of (the King <i>against</i>)	709
Fletcher (Andr�e <i>against</i>)	161
Fletcher v. Dyche	32
The Same v. Smiton	656
Foster v. Allanson	479
Francis (the King <i>against</i>)	484
Freeman (Colkett <i>against</i>)	59
Frith v. Leroux	57
Fullarton (Malcolm <i>against</i>)	645

G.

Galliers (Roe dem. Hunter <i>against</i>)	133
Gibson (Townley <i>against</i>)	701
Gilbert (Fairtitle <i>against</i>)	169
Gillot (Denn dem. Trickett <i>against</i>)	431
Goff Q. T. v. Popplewell	707
Goodtitle dem. Peake v. Pegden	720
Graham v. Robertson	282
Gray (Dore <i>against</i>)	358
Green's Assignees (Roe dem. Hunter <i>against</i>)	133
Gregson lessor of Roe v. Harrison	425
Gulliver v. Drinkwater.	261

H.

INDEX OF CASES REPORTED.

H.

	Pages.
Hall v. Buchanan	734
Hall (Vernon <i>against</i>)	648
Hankey (Vernon <i>against</i>)	113
Hanson (Vernon <i>against</i>)	287
Harben (Edwards <i>against</i>)	587
Hardcastle (Robinson <i>against</i>)	241—781
Harrison (Roe dem. Gregson <i>against</i>)	425
Harvey (Webb <i>against</i>)	757
Hartley (De Hahn <i>against</i>)	186
Heathcote v. Crookshanks	24
Heaton [improperly called Ritson] (the King <i>against</i>)	184
Heaven (the King <i>against</i>)	772
Hodges v. Sandon	439
Henderson v. Withy	576
Hendon, the Lord of the manor of (the King <i>against</i>)	484
Hoare v. Parker	376
Hodgson (Stadholme <i>against</i>)	390
Hodsdon lessor of Doe v. Staple	684
Horwood v. Smith	750
Housley (Sambidge <i>against</i> in error)	17
Hughes (Morgan <i>against</i>)	225
Hunter lessor of Roe v. Galliers	133
Hurd (Owen <i>against</i>)	643

I.

Jackson v. Williamson	281
Joddrell (Dodd <i>against</i>)	235
Jodrell (Revell <i>against</i>)	415
Jolliffe (the King <i>against</i>)	90
Jones (the King <i>against</i>)	1
Judd (the King <i>against</i>)	255

K.

Kenilworth, the Inhabitants of (the King <i>against</i>)	598
Kernot v. Norman	390
King (the King <i>against</i>)	234
c	King

INDEX OF CASES REPORTED.

	<i>Pages.</i>
King v. Leith	141
The King v. Aire and Calder Navigation, the Undertakers of	660
——— v. Amery	515
——— v. Andrews, St. Holborn, the Inhabitants of	627
——— v. Archer	270
——— v. Bond	767
——— v. Brooke	190
——— v. Buntz	683
——— v. Cambridge, the Mayor of	456
——— v. Cheshunt, the Inhabitants of	623
——— v. Chertsey, the Inhabitants of	37
——— v. Cliviger, the Inhabitants of	263
——— v. Colchester, the Mayor of	259
——— v. Dimpsey	96
——— v. Eaton	89.—285
——— v. Ely, the Bishop of	290
——— v. Excise, the Commissioners of	381
——— v. Faringdon, the Inhabitants of	466
——— v. Filewood	145
——— v. Fillongley, the Inhabitants of	709
——— v. Francis	484
——— v. Heaton [improperly called Ritson]	184
——— v. Heaven	772
——— v. Hendon, the Lord of the Manor of	484
——— v. Jolliffe	90
——— v. Jones	1
——— v. Judd	255
——— v. Kenilworth, the Inhabitants of	598
——— v. King	234
——— v. Knighton, the Inhabitants of	48
——— v. Lewis	617
——— v. Llandilo District of Roads, the Commissioners of	232
——— v. Llangammarch, the Inhabitants of	628
——— v. London, the Mayor, &c. of	177
——— v. Lopen, the Inhabitants of	577
——— v. Lynn	733
——— v. Marshall	2
——— v. Mafon	581
	The

INDEX OF CASES REPORTED.

	Pages.
The King v. Mattingley, the Inhabitants of	12
—— v. Middlezoy, the Inhabitants of	41
—— v. Monk	515
—— v. Newton Toney, the Inhabitants of	453
—— v. Nicholas St. Nottingham, the Inhabitants of	726
—— v. Odiham, the Inhabitants of	622
—— v. Pateman	777
—— v. Penderryn, the Inhabitants of	260—513
—— v. Philip, St. Birmingham, the Inhabitants of	624
—— v. Potts, Softley, and Wood	96
—— v. Rennett	197
—— v. Ritson (properly Heaton)	484
—— v. Ronton Abbey, the Inhabitants of	207
—— v. Sharpness	47
—— v. Sheffield, the Inhabitants of	106
—— v. Sparrow	198
—— v. Stoke, the Inhabitants of	451
—— v. Stubbs	395
—— v. Sulgrave, the Inhabitants of	376
—— v. Surry, the Justices of	504
—— v. Terret	735
—— v. Thompson	18
—— v. Undertakers of the Aire and Calder Navigation	660
—— v. Watson	199
—— v. Woodrow	731
—— v. Wyer	77
—— v. Young	472
Knatchbull (Woodgate <i>against</i>)	148
Knighton, the Inhabitants of (The King <i>against</i>)	48
Kretchman, (Winter <i>against</i>)	45

L.

Ladbroke v. Crickett	649
Lane v. Bacchus	44
Longman's Assignees v. Leith	141
Laroche v. Wasbrough	737
Lascelles (Smith <i>against</i>)	187
Law lessor of Silvester v. Wilson	444
Layton (Pechell <i>against</i>)	512.—712
	Lee

INDEX OF CASES REPORTED.

	<i>Pages.</i>
Lee (Worley <i>against</i>)	112
Leicester the Earl of (Rooke <i>against</i>)	16
Leith (the King <i>against</i>)	141
Lempriere v. Pasley	485
Leroux (Frith <i>against</i>)	57
Lewis (The King <i>against</i>)	617
Lickbarrow v. Mason	63
Llandilo District of Roads, the Commissioners of (The King <i>against</i>)	232
Llangammarch, the Inhabitants of (The King <i>against</i>)	628
Lloyd (Barber <i>against</i>)	513
The same v. Maund	760
London, Mayor and Aldermen of (The King <i>against</i>)	177
Lonsdale, Lord v. Church	388
Lopen, the Inhabitants of (The King <i>against</i>)	577
Lynn (The King <i>against</i>)	733

M.

Machell (Edmonson <i>against</i>)	4
Maddon dem. Baker v. White	159
Malcolm v. Fullarton	645
Maling (Atkinson <i>against</i>)	462
Mapledoram (Carlake <i>against</i>)	473
Mardiner v. Elliot	746
Marshall (The King <i>against</i>)	2
Martin v. Court	640
The same (Peshall, Bart. <i>against</i>)	712
Martinnant (Touffaint <i>against</i>)	100
Mason (The King <i>against</i>)	581
Mason (Lickbarrow <i>against</i>)	63
Masters <i>qui tam</i> v. Drayton	496
Matson v. Wharam	80
Matteson (Atkinson <i>against</i>)	172
Mattingley, the Inhabitants of (The King <i>against</i>)	12
Maund (Lloyd <i>against</i>)	760
Mayor, &c. of Cambridge (The King <i>against</i>)	456
Mayor of Colchester (The King <i>against</i>)	259
Mayor and Aldermen of London (The King <i>against</i>)	177
Mercer's Executors (Edwards <i>against</i>)	587

Middlezoy,

INDEX OF CASES REPORTED.

	Pages.
Middlezoy, the Inhabitants of (The King <i>against</i>)	41
Milbourne v. Nixon	40
The same (Doe dem. Milburne <i>against</i>)	721
Milward v. Thatcher	81
Modigliani (Way <i>against</i>)	30
Monk (The King <i>against</i>)	581
Morgan v. Hughes	225
Mytton lessor of Fairtitle v. Gilbert	169

N.

Newnham (Da Costa <i>against</i>)	407
Newton Toney, the Inhabitants of (The King <i>against</i>)	453
Nicholas St. in Nottingham, the Inhabitants of (The King <i>against</i>)	726
Nissen (Salomons <i>against</i>)	674
Nixon (Milbourne <i>against</i>)	40
Norman (Kennet <i>against</i>)	390

O.

Odiham, the Inhabitants of (The King <i>against</i>)	622
Orley [properly Worley] v. Lee	112
Owen v. Hurd	643

P.

Padget v. Priest	97
Page v. Divine	40
Page (Duberley <i>against</i>)	391
Painter (Smith <i>against</i>)	719
Palmerston lessor of Doe v. Copeland	779
Parker (Hoare <i>against</i>)	376
Parnshaw (Buchanan <i>against</i>)	745
Pasley (Lempriere <i>against</i>)	485
Pateman (The King <i>against</i>)	777
Pegden (Goodtitle dem. Peake <i>against</i>)	720
Pethell, Bart. v. Layton	512—712
The same v. Martin	<i>ibid.</i>
Penderryn, the Inhabitants of (The King <i>against</i>)	260—513
Philip, St. in Birmingham (The King <i>against</i>)	624
Philips v. Bury	346
Pierce (Davies <i>against</i>)	53.—125

d

Popple-

INDEX OF CASES REPORTED.

	<i>Pages.</i>
Popplewell (<i>Goff & T. against</i>)	707
Portherch (<i>Powell against</i>)	55
Potts (<i>The King against</i>)	96
Powell (<i>Collins against</i>)	756
Powell <i>v.</i> Portherch	55
Priest (<i>Padget against</i>)	97

R.

Radcliffe <i>v.</i> D'Oyly	630
Rastal (<i>Straton against</i>)	366
Rennett (<i>The King against</i>)	197
Revell <i>v.</i> Jodrell	415
Ritson [otherwise Heaton] (<i>The King against</i>)	184
Robertson <i>v.</i> Graham	282
Robinson <i>v.</i> Hardcastle	781.—241
The same (<i>Selby against</i>)	758
Roe <i>v.</i> Cock	257
Roe dem. Wood <i>v.</i> Doe	644
Roe dem. Gregson <i>v.</i> Harrison	425
Roe dem. Hunter <i>v.</i> Galliers	133
Rogers <i>v.</i> Stephens	713
Ronton Abbey, the Inhabitants of (<i>The King against</i>)	207
Rooke <i>v.</i> Earl of Leicester	16
Ruffel <i>v.</i> The Men of Devon	667

S.

St. Andrew Holborn (<i>The King against</i> the Inhabitants of)	628
St. Philip in Birmingham (<i>The King against</i> the Inhabitants of)	624
Salomons <i>v.</i> Nissen	674
Sambidge <i>v.</i> Housley in Error	17
Samuel <i>v.</i> Evans	569
Sandon (<i>Hedges against</i>)	439
Scott <i>Qui Tam v.</i> Brest	238
Selby <i>v.</i> Robinson	758
Sharpness (<i>The King against</i>)	47
Shaw (<i>Watson against</i>)	654
Shee (<i>Deey against</i>)	617

Sheffield,

INDEX OF CASES REPORTED.

	Pages.
Sheffield, the Inhabitants of (<i>The King against</i>)	106
Shepherd (<i>Entwistle against</i>)	78
The same (<i>Zachary against</i>)	781
Silvester dem. Law v. Wilton	444
Smith v. Barrow	476
The same (Doe dem. Bromfield <i>against</i>)	436
The same (Horwood <i>against</i>)	750
The same v. Lascelles	187
The same v. Painter	719
Smiton (<i>Fletcher against</i>)	656
Sommers, Lord (Lord Amherst <i>against</i>)	372
Sparrow (<i>The King against</i>)	198
Stadholme v. Hodgson	390
Staple (Doe dem. Hodsdon <i>against</i>)	684
Stephens (Rogers <i>against</i>)	713
Stoke, the Inhabitants of (<i>The King against</i>)	451
Straton v. Rastall	366
Stubbs (<i>The King against</i>)	395
Sulgrave, the Inhabitants of (<i>The King against</i>)	376
Surry, Earl of (<i>Boothman against</i>)	5
Surry, the Justices of (<i>The King against</i>)	504
Syed's Assignees v. Pasley	485

T.

Taylor (<i>Buckley against</i>)	600
Terret (<i>The King against</i>)	735
Thatcher (<i>Milward against</i>)	81
Thomas (<i>Auriol against</i>)	52
Thompson (<i>the King against</i>)	18
Tindal v. Brown	186
Touffaint v. Martinnant	100
Towers (<i>Watkins against</i>)	275
Townley v. Gibson	701
Trickett lessor of Denn v. Gillot	431
Tyler's Assignees v. Hankey	113
The same v. Hanson	287

V.

Vernon v. Hall	648
The same v. Hankey	113
The	

INDEX OF CASES REPORTED.

	Pages.
The same v. Hanson	287
Vesley lessor of Doe v. Wilkinson	209
Undertakers of the Aire and Calder Navigation (The King against)	660
W.	
Walker (Bonafous against)	126
Walbrough (Laroche against)	737
Watkins v. Towers	275
Watson (The King against)	199
The same v. Shaw	654
Way v. Modigliani	30
Webb v. Harvey	757
West (Cates against)	183
Weston v. Withers	511
Wharam (Matson against)	80
White <i>Qui Tam</i> v. Boot	274
White (Maddon dem. Baker against)	159
Whitter v. Cazelet	683
Wilkinson (Doe dem. Vesley against)	209
Williamson (Jackson against)	281
Wilson (Silvester dem. Law against)	444
Winter v. Kretchman	45
Withers (Weston against)	511
Withy (Henderson against)	576
Wood lessor of Roe v. Doe	644
Woodgate v. Knatchbull	148
Woodrow (The King against)	731
Worley v. Lee	112
Wyer (The King against)	77

Y.

Yea, Bart. v. Field	708
Young (The King against)	472

Z.

Zachary v. Shepherd	781
---------------------	-----

A

T A B L E

O F T H E

C A S E S C I T E D.

A.	
A PPLEFORD'S case. P. 344, 355, 6.	
Archer (the King <i>against</i>)	203
Argent <i>v.</i> the Dean and Chapter of St. Paul's	16
Argent (the King <i>against</i>)	181
Attorney General <i>v.</i> Clare-hall	312
The same <i>v.</i> Le Merchant	201

B.	
Bailiffs and Aldermen of New Radnor (the King <i>against</i>)	522
Baldwin <i>v.</i> Richards	511
Bamford <i>v.</i> Baron	594
Beal (Hunter <i>against</i>)	75
Beer and Seaton (the King <i>against</i>)	454
Benson <i>v.</i> Parry	52
Bentley <i>v.</i> Cook	265, 9
Bentley (Throgmorton <i>against</i>)	780
Berkhamstead (the King <i>against</i>)	551
Bingham (Moulton <i>qui tam against</i>)	511
Birbeck (Eyre <i>against</i>)	595
Bishop of Lincoln (the King <i>against</i>)	312, 338
Bisset (Worsley <i>against</i>)	166
Bridgewater <i>v.</i> Gandersequi	647
Bryson <i>v.</i> Wylie	137, 8, 140
Burgeses of Calne (the King <i>against</i>)	528
Bush <i>v.</i> Leake	441
Butler <i>v.</i> Upton	258
Butt <i>v.</i> Mow	79

C.	
Calne, Burgeses of (the King <i>against</i>) P. 528	
Carne (Slater <i>against</i>)	442
Carter <i>v.</i> Roberts	79
Cafe (Falkner <i>against</i>)	491
Cavendish, (Devonshire Duke of <i>against</i>)	244, 5, 250, 253
Cawdry <i>v.</i> the High Commission Court	354
Clare-hall (Attorney General <i>against</i>)	312
College St. John's <i>v.</i> Todington	313
Cologan (Smith <i>against</i>)	188
Cook (Bentley <i>against</i>)	265, 9
Cooper (Jones <i>against</i>)	80
Copestake (Smith <i>against</i>)	58
Court, the High Commission (Cawdry <i>against</i>)	354
Cuff (Savignac <i>against</i>)	66
Cumming <i>v.</i> Hanforth	58
Cunningham (Mawbray <i>against</i>)	81

D.	
Dean and Chapter of St. Paul's (Argent <i>against</i>)	16
De Faria (Peckham <i>against</i>)	80
Devonshire, Duke of, <i>v.</i> Cavendish	244, 5, 250, 253
Drury <i>v.</i> Drury	161
Duberley <i>v.</i> Page	392

E.

INDEX OF CASES CITED, &c.

E.		King the, v. Archer		Page 253
Elslack (the King <i>against</i>)	Page 454	— v. Argent		181
Eyre v. Birbeck	595	— v. Berkhamstead		551
F.		— v. Calne, Burgesses of		518
Falkener v. Case	491	— v. Elslack		454
Fenn (Winch <i>qui tam against</i>)	52	— v. Giles, St.		50
Fisher (Gardner <i>against</i>)	443	— v. Goter		48
Foley v. Lord Peterborough	166	— v. Green		19
Foster v. Thackery	611	— v. Gregory		334
Frederick (Spieres <i>against</i>)	155	— v. Hartley	21, 23	
G.		— v. Hawkeswood		606
Gandersequi (Bridgewater <i>against</i>)	647	— v. Ives, St.		528
Gardiner v. Fisher	443	— v. Langhour		<i>ib.</i>
Giles, St. (the King <i>against</i>)	50	— v. Lincoln, Bishop of	312, 338	
Gill (Haslington <i>against</i>)	597	— v. Linkfield-street, in Rygate, the In-		
Godolphin, Lord (Marlborough Duke of		habitants of		514
<i>against</i>)	251	— v. London, Mayor, &c. of		182
Godfall (Passel <i>against</i>)	44	— v. Malmesbury	525, 557	
Golightly v. Reynolds	752, 4	— v. New Malton	522, 547, 551	
Gosage v. Taylor	435	— v. New Radnor, the Bailiffs and Alder-		
Goter (the King <i>against</i>)	48	men of		522
Gregory (the King <i>against</i>)	334	— v. North Cray, Inhabitants of		599
Green (the King <i>against</i>)	19	— v. Oxford, City of	551, 556	
Gurney (Hall <i>against</i>)	464	— v. Sparrow		196
H.		— v. Thaxted		528
Hall v. Gurney	464	— v. Topcroft		50
Hanforth (Cumming <i>against</i>)	58	— v. Urquhart		196
Hardcastle v. Howard	28	— v. Winchester, City of		556
Hartley (the King <i>against</i>)	21, 23	— v. York, Mayor, &c. of	528, 530	
Haslington v. Gill	597	L.		
Hawkeswood (the King <i>against</i>)	606	Langhour (the King <i>against</i>)		528
High Commission Court (Cawdry <i>against</i>)	354	La Riviere (Stokes <i>against</i>)		75
Holloway v. Rakes	55	Leake (Bush <i>against</i>)		446
Howard (Hardcastle <i>against</i>)	28	Le Merchant (the Attorney General <i>against</i>)		201
Hunter v. Beal	75	Levy (Moravia <i>against</i>)		483
I.		Lincoln Bishop of (the King <i>against</i>)	312,	
John's, St. College v. Todington	313		338	
Jones v. Cooper	80	Linkfield-street, in Rygate, the Inhabitants		
The same (Thompson <i>against</i>)	43	of (the King <i>against</i>)		514
Ives, St. (the King <i>against</i>)	528	London, Mayor, &c. of (the King <i>against</i>)		182
K.		M.		
Kelly (Murray <i>against</i>)	611	Malmesbury case		525, 557
King the, v. Appleford	348, 355, 6	Malton, New (the King <i>against</i>)	522, 547, 551	
		Marlborough, Duke of, v. Lord Godolphin		251
				Mawbray

INDEX OF CASES CITED, &c.

Mawbray v. Cunningham	Page 81	St. Ives (the King <i>against</i>)	Page 528
Mayor, &c. of London (the King <i>against</i>)	182	St. Paul's, Dean and Chapter of (Argent <i>against</i>)	16
Mayor, &c. of York (the King <i>against</i>)	528, 530	Salmon v. Saxby	497
Moravia v. Levy	483	Sandford v. Rogers	443
Moulton, <i>qui tam</i> , v. Bingham	511	Savignac v. Cuff	66
Mow (Butt <i>against</i>)	79	Saxby (Salmon <i>against</i>)	497
Mulliner v. Wilkes	441, 5	Seaton and Beer (the King <i>against</i>)	454
Murray v. Kelly	611	Shapland v. Smith	446, 7
N.		Simpson (Tilly <i>against</i>)	659
Newcastle, Duke of (White <i>against</i>)	58	Skeggs (Stanhope, Lord <i>against</i>)	134, 429, 430
New Malton (the King <i>against</i>)	522, 547, 551	Slater v. Carne	442
New Radnor, the Bailiffs and Aldermen of (the King <i>against</i>)	522	Smith v. Cologan	188
North Cray, Inhabitants of (the King <i>against</i>)	599	The same v. Copestakes	58
O.		The same (Shapland <i>against</i>)	446, 7
Oxford, City of (the King <i>against</i>)	551, 556	Sparrow (the King <i>against</i>)	196
P.		Spieres v. Frederick	155
Page (Duberley <i>against</i>)	392	Stanhope Lord, v. Skeggs	134, 429, 430
Parry (Benson <i>against</i>)	52	Stokes v. La Rivières	75
Paffel v. Godfall	44	T.	
Paul's, St. the Dean and Chapter of (Argent <i>against</i>)	16	Taylor (Gofage <i>against</i>)	435
Peckham v. De Faria	80	Tellfair (Wallace <i>against</i>)	188
Peterborough Lord (Foley <i>against</i>)	166	Thackery (Foster <i>against</i>)	611
Petre (Portis <i>against</i>)	715	Thaxted (the King <i>against</i>)	528
Pool v. Wills	758	Thompson v. Jones	43
Portis v. Petre	751	Throgmorton v. Bentley	780
R.		Tilly v. Simpson	659
Radnor New, the Bailiffs and Aldermen of (the King <i>against</i>)	522	Todington (St. John's College <i>against</i>)	313
Rakes (Holloway <i>against</i>)	55	Topcroft (the King <i>against</i>)	50
Reynolds (Golightly <i>against</i>)	752, 4	U.	
Richards (Baldwin <i>against</i>)	511	Upton (Butler <i>against</i>)	258
Roberts (Carter <i>against</i>)	79	Urquhart (the King <i>against</i>)	196
Rogers (Sandford <i>against</i>)	443	W.	
Rygate, the Inhabitants of Linkfield-street, (the King <i>against</i>)	514	Wallace v. Tellfair	188
S.		White (Newcastle Duke of, <i>against</i>)	58
St. Giles (the King <i>against</i>)	50	Wilkes (Mulliner <i>against</i>)	441, 5
St. John's College v. Todington	313	Wills (Pool <i>against</i>)	758
		Winch <i>qui tam</i> v. Fenn	52
		Winchester, City of (the King <i>against</i>)	P. 556
		Worsley v. Bisset	166
		Wylie (Bryson <i>against</i>)	137, 8, 140
		Y.	
		York, Mayor, &c. of (the King <i>against</i>)	528, 530

ERRATA

ERRATA AND ADDENDA.

Page

- 14. l. 2. for "to" read "from"
- 18. l. 17. for "308" read "329."
- 32. last l. for "defendant" read "plaintiff."
- 35. l. 23. for "Redriffe" read "Nedriffe."
- 52. l. 8. for 6l. 6s. read 6s. 6d.
- 53. l. 15. after "years" add "ago."
- 85. last line for "Dougl. 382" read "383."
- 88. l. 27. the words "former" and "latter" are misplaced.
- 99. l. 1. for "confined" read "confirmed."
- 126. l. 3. from the bottom for "plaintiff" read "defendant."
- 131. l. 5. for "advantake" read "advantage"
- 136. in the margin for "1 Eq. Cas. Abr." read "2 Eq. Cas. Abr."
- 153. l. 38. for "is" read "his."
- 160. last line for "when" read "where."
- 161. marg. for "29 G. 2." read "19 Geo. 2."
- 184. l. 1. for "Ritson" read "Heaton."
- l. 4. for "defendant as chief bailiff" read "steward."
- 185. l. 38. "fine" read "amerciament."
- 218. l. 21. for "intestate" read "testate."
- 253. l. 31. after "daughter" add "and considering it as a gift of the money absolutely from the mother to the daughter, and the settlement of that money by the daughter."
- 275. last line but 2. for "Guildhall" read "Westminster."

Page

- 309. l. 26. for "confounder" read "co-founder."
- 313. l. 36. for "penam" read "plenam."
- 402. l. 3. for "party" read "partly."
- l. 8. for "it" read "in."
- 438. l. 13. for "30th" read "31st."
- 441. l. 24: 443. l. 11: & 444. l. 4. for "said by Denison, J. in Baynham v. Matthews" read "said by Denison, J. of Baynham v. Matthews in Robinson v. Raley. 1 Burr. 321."
- 527. l. 29. for "judment" read "judgment."
- 554. l. 15. for "feizue" read "seizure."
- 576. l. 14. for "defendants" read "plaintiffs."
- 597. marg. for "to a plea of" read "to a plea in."
- 599. l. 20. for "1 Str. 242." read "232."
- 626. l. 35. for "Birmingham" read "Povick."
- 664. l. 36. for "14 Geo. 2." read "14 Geo. 3."
- 687. l. 15. for "Fitz." read "Tit."
- 719. l. 4. for "and" read "or"
- 728. l. 37. for "43 El. c. 4." read "43 El. c. 2."
- 741. l. after "instrument" add "operates."
- 758. l. 13. for "books" read "book."

ERRATA AND ADDENDA IN THE FIRST VOLUME.

Page

- 6. l. 22. for "H. 24 G. 2." read "G. 3."
- 25. l. 17. for "whether" read "weather"
- 455. l. 24. for "to" read "from"
- 471. l. 13. for "tenants" read "tenements."
- 474. l. 30. for "621." read "624."
- 475. l. 32. for "defendant" read "bankrupt."
- 477. l. 13. for "distrefs" read "trespass."

Page

- 552. l. 8. marg. for "term time" read "succeeding term."
- 631. l. 6. for "127. a." read "187. a."
- 762. l. 29. for "mortgage," read "mortgagee."
- Index of names for "Way (Goodtitle dem. Estwick against) 732." read "735."

CASES

Hargrave

C A S E S
ARGUED and DETERMINED
IN THE
Court of KING's BENCH,
IN
Trinity Term,

In the Twenty-Seventh Year of the Reign of GEORGE III.

The KING *against* JONES.

THE Defendant, late sheriff of *Carnarvonshire*, had been requested by the party in the original cause within six months after he went out of office to return a writ in the cause, but he had not been served with any rule of court for that purpose; he did not return it, and thereupon an attachment had issued against him. A rule had been granted to shew cause why the attachment should not be set aside for irregularity, on the second section of the 20. *Geo. 2. c. 37.* by which it is enacted "that no sheriff shall be liable to be called upon to make a return of any writ or process, unless he be required so to do within six months after the expiration of his said office."

Bower shewed cause against the rule, and insisted that the sheriff was liable to an attachment for not returning a writ, if called upon by the party within six months after he went out of office, though no rule of court had required him to do it. And that if the present application were to succeed, it would be allowing the defendant to protect himself from the censure of the court by his own act of neglect and refusal.

Leycester, contra, contended that the defendant should have been served with a rule of court to return the writ, in order to bring him within the act of parliament.

Monday,
June 11th.

A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within six months after the expiration of his office, notwithstanding he was requested by the party to return it before the six months were expired.

B

Per

1787.

The KING
against
JONES.

Per curiam. The only way to call on a sheriff to return a writ is by a rule and process of the court. The statute was made for the ease and benefit of sheriffs. And if this mode of desiring a return of a writ were to be allowed, it would be productive of numberless questions, as to what should be deemed a calling on the sheriff. But as this point had never been settled, The Court made *the rule absolute without costs*, even though it was for an irregularity.

Monday,
June 11th.

The KING against MARSHAL.

By the constitution of the corporation of Hedon a person having served a seven years apprenticeship to a freeman residing in the town is intitled to his freedom, and by a by-law the indentures must be inrolled by the town-clerk within four months from the date.

An apprentice who is bound to a freeman, resident only occasionally, and whose service is to be performed at another place, is not intitled to have his indentures inrolled, nor will the court grant a mandamus to the town clerk for that purpose.

RULE calling on the defendant, who was Town-clerk of the borough of *Hedon* in *Yorkshire*, to shew cause why a mandamus should not issue, directing him to inroll the indentures of apprenticeship, by which *John Briggs* was bound an apprentice to *John Burstall* as a mariner, in one of the public books of the corporation of *Hedon*. It appeared from the affidavits on which the rule was founded, that by the usage and constitution of the borough of *Hedon*, all persons who have served apprenticeships for seven years to any freeman of the corporation resident within the town are entitled to the freedom of the corporation. That by a bye law of the corporation, made in *February* 1752, it was enacted, that no apprentice should be entitled to the freedom of the corporation, unless he should within four months after the date of the indentures of apprenticeship cause the indentures to be inrolled by the town-clerk in one of the public books belonging to the corporation. It was likewise stated that *Burstall* was a freeman of and resident in the town of *Hedon*, and had served the offices of bailiff of the corporation in 1782, of alderman in 1783, and of mayor in 1784. That on the 1st *May* 1786 *John Briggs* was bound apprentice to *John Burstall* for seven years; and that on an application to the defendant within the four months to inroll the indentures he had refused, assigning as a reason that *Burstall* usually resided at *Kingston upon Hull*, where his business was carried on, and that *Hedon* was only his place of residence during some of the Summer months.

Baldwin now shewed cause against the rule, and insisted that *Briggs* was not entitled to the freedom of the corporation. That according to the true construction of the usage and bye-law only

only those persons who served apprenticeships within the town and borough of *Hedon* were entitled to that privilege. And that the circumstance of the master's occasional residence in *Hedon* could not make any difference, since the business was entirely carried on at *Kingston*, at which place therefore the service was performed.

1787.

The KING
against
MARSHAL.

Chambre in support of the rule. The question is not upon the residence of the apprentice during the servitude, but where the master resided. By the ancient constitution of the borough, all persons who serve apprenticeships for seven years to any freeman resident within the town are entitled to the freedom of the corporation. Now in this case the master was a freeman of and resident within the town: And it is in respect of his freedom that the privilege is to be communicated to the apprentice. Then the bye-law cannot alter the ancient constitution: But it is to be observed that even according to the bye-law the inrolment is to be made within four months after the execution of the indentures; and it cannot be known at that time where the apprentice will reside during the time of the apprenticeship; which shews that the apprentice is entitled to the effect of the present application, since he is bound an apprentice to a person who is resident within as well as a freeman of the borough. At all events the question respecting the title of the apprentice to the freedom of the corporation will be open to be discussed on some future occasion, after he shall have served his apprenticeship: but the present motion is only to have the indentures inrolled, in order to give him an opportunity of trying that question hereafter. And if this rule be discharged it will be conclusive against him for ever; but if granted it cannot be conclusive in his favor. But

The Court were clearly of opinion that, as the trade was carried on at *Kingston*, and the service was performed there, the apprentice was not entitled to have this rule made absolute. That the privilege sought for was in respect of the benefit which the borough of *Hedon* might receive from the service of the apprentice; whereas in the present instance the benefit to be derived from the service of the apprentice could only be received by the inhabitants of *Kingston*. That it was a kind of fraud upon the bye-law of the corporation of *Hedon*, and that it was evident from the indentures that the service under them could not be performed at *Hedon*, which is an inland town, because *Briggs* was bound apprentice as a mariner.

Rule discharged.

EDMONDSON

Monday,
June 11th.

EDMONDSON *against* MACHELL.

Where a new trial is moved for on the ground of a misdirection in point of law, if the court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law.

ON a motion for a new trial, Mr. Baron *Perryn*, before whom the cause was tried at the last assizes at *Lancaster*, reported that this was an action of trespass for assaulting and beating the plaintiff's niece, *per quod servitium amisit*. The niece lived with her aunt in *Lancaster*, as her servant; her mother lived in a different part of the same county; and by the permission of the plaintiff, the niece went in the month of *March* last to see her mother; at which time the assault was made. The case proved on the part of the plaintiff was aggravated with many circumstances of ill-treatment (which were particularly related in the detail of the evidence). Another cause stood next in the paper for trial, which was brought by the niece against the same defendant for the same assault. The counsel for the plaintiff declared their intention of not trying that cause, and withdrew the record. The defendant's counsel contended that the jury could only give damages in this cause for the loss of service; the plaintiff's counsel insisted on the contrary. The learned Judge thought the aunt in this case stood in *loco parentis*; and as in actions brought by a father for deflowering his daughter, whereby he lost her service, large damages had been often given, he thought this case bore an analogy to that, and that the jury upon the whole of the case had a right to give such damages as they thought just, considering the situation and circumstances of the defendant, who was proved to be a captain in the militia, the qualification for which was 300*l.* a year. The jury after consideration found a verdict for the plaintiff, damages 300*l.*; with which the learned Judge declared himself not dissatisfied.

This application was made last term, on the ground of a misdirection to the jury. The defendant's counsel denied that they had entered into any compromise to permit the jury to take into consideration in the measure of their damages the injury which the niece herself had sustained, and which was the subject of the next action, in consideration of the plaintiff's counsel withdrawing the record in the next action. But it was admitted that the damages were not excessive according to the evidence then given, if the jury could take both the actions into their consideration at once.

After a question put this day to the plaintiff's counsel whether the niece would enter into a rule not to proceed in the action in which she herself was plaintiff, which was answered in the affirmative,

ASHHURST,

ASHHURST, J.—said, that the judges of this court had consulted with the rest of the judges on this case, and the result of their opinion was, without giving any positive opinion upon the question of law, that this rule ought to be discharged. An application for a new trial is an application to the discretion of the court, who ought to exercise that discretion in such a manner as will best answer the ends of justice. It does not require much penetration to see what are the ends of justice in the present case. It is certain that the girl herself ought to have some satisfaction for the injury she received; and as she consents not to try her action, the question is whether justice has not already been done; for it was admitted at the bar that, if the injury she sustained could be taken into consideration in this action brought by the aunt, the damages which the jury have given are by no means excessive. Then there does not appear to be any ground for the defendant to call on the discretion of the court to send this cause down to be re-tried on a technical objection in point of law. And all the judges are unanimously of opinion that, as complete and substantial justice has been done, there is no reason to grant a new trial.

On the plaintiff's undertaking to pay over to the niece the damages, after deducting the costs of this action, and on the niece's undertaking not to proceed in the action in which she herself was plaintiff,

Rule discharged without costs.

BOOTHMAN *against* The Earl of SURRY.

Tuesday,
June, 12th.

THIS was an action of debt against the defendant, who was chief bailiff of the liberty of *Hallamshire*, for an escape. The declaration stated, that, in *Easter term*, in the 24th year of the reign of the present king, the plaintiff had recovered by the judgment of the court of King's Bench 37*l.* against one *John Woolhouse*; that on the 12th *February*, in the 25th year, &c. he sued out a *capias ad satisfaciendum*, directed to the sheriff of *Yorkshire*, who made his mandate thereon to the defendant, requiring the defendant to arrest the said *John Woolhouse*, so that the sheriff might have his body at the return of the writ; upon which the defendant afterwards within his bailiwick took and arrested the said *Woolhouse* by his body in execution for the said debt, and had and detained him in his

The bailiff of a liberty who has the return and execution of writs is liable to an action of debt for an escape, if he remove a prisoner taken in execution to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff.

1787.

BOOTHMAN
against
The Earl of
SURRY.

custody in the gaol of the said chief bailiff in and for the said bailiwick in execution at the suit of the said plaintiff for the cause aforesaid, until the defendant, so being chief bailiff of the said liberty, afterwards, to wit, on, &c. without the licence or consent and against the will of the plaintiff, and without any legal warrant or authority, permitted and suffered the said *Woolhouse*, so being in his custody, to escape out of his custody, and to go at large wherever he would, the said plaintiff then or yet not being satisfied, &c.

Pleas, 1st. *Nil debet*. Secondly, That true it is that he the defendant did take and arrest the said *John Woolhouse* by his body, and him for a short space of time had and detained in his custody in the gaol of him the said chief bailiff in and for the said bailiwick, at the suit of the plaintiff by his body, as in the said declaration in that behalf mentioned: But the defendant further says, that always from the time of his having so taken and arrested the said *Woolhouse* as aforesaid until the time of his removal and delivery into the custody of the sheriff of *Yorkshire*, as is herein after mentioned, he the said defendant did safely and securely keep in his custody within the liberty of *Hallamshire* aforesaid the body of the said *John Woolhouse*. That as soon as conveniently might be after such taking and arresting of the said *John Woolhouse* as aforesaid, and before the return of the said writ of *capias ad satisfaciendum* in the said declaration mentioned, to wit, on the 26th day of *April* in the 25th year aforesaid, he the said defendant for the delivery of the body of the said *John Woolhouse* from and out of the hands and custody of him the defendant into the hands and custody of the said sheriff of *Yorkshire*, in order that the said sheriff might have the body of the said *John Woolhouse* before the said lord the king at *Westminster* at a day in the said writ of *capias ad satisfaciendum* in that behalf mentioned, according to the exigency of the said writ, he the defendant did by the nearest and most convenient way, and with all reasonable expedition, necessarily remove and carry away the body of the said *John Woolhouse* from and out of the said liberty of *Hallamshire* to and into the common gaol or prison of the sheriff of *Yorkshire*, at the castle of *York*, in the county of *York*, and the body of the said *John Woolhouse* he the defendant did then and there for the purpose aforesaid deliver from and out of his hands and custody into the hands and custody of the said sheriff of *Yorkshire*, as he the said defendant was by the said mandate in that behalf required;

and

and thereupon the said sheriff then and there, to wit, on the said 26th day of *April*, in the 25th year aforesaid, at the castle of *York* aforesaid, in his gaol or prison there had and received into his hands and custody the body of the said *John Woolhouse* for the cause aforesaid, which is the same suffering and permitting the said *John Woolhouse* to go at large and escape out of his custody and go wheresoever he would, whereof the said plaintiff hath above complained against the said defendant, and this he the said defendant is ready to verify, wherefore, &c. To this plea there was a general demurrer, and joinder.

1787.

BOOTHMAN
against
The Earl of
SURRY.

Chambre, in support of the demurrer. The question is whether, under the circumstances disclosed by these pleadings, the present defendant has or has not subjected himself to an action of escape, for permitting the defendant in the original action to go out of his custody. The execution was complete in the liberty of *Hallamshire*, when the defendant had arrested the prisoner by virtue of the sheriff's mandate, and had lodged him in his own gaol; after which the defendant could not suffer the prisoner to go out of his bailiwick without any legal authority, such as an *habeas corpus*. The defendant does not act as a bailiff of the sheriff, but by virtue of his own authority as chief bailiff of *Hallamshire* in a distinct and independent liberty; and his office is in that respect similar to that of a sheriff. The sheriff is not answerable for the conduct of such an officer. If it be necessary for him to make any return to process, he must be ruled for that purpose. And whatever would be deemed an escape in the sheriff, will be equally so in the owner of such a franchise as the present. There is no instance of a bailiff's having returned to such a writ such facts as are here pleaded; nor would they constitute a good return. When the court enquire into the execution of a writ of this sort, they call on the sheriff for a return of the *capias ad satisfaciendum*, who annexes the bailiff's return to him "*quod cepit corpus prædicti J. S. cujus corpus A. B. (ballivus) coram justiciariis domini regis ad diem et locum infra contentum paratum habebit.*" *Retorn. Brev.* 168, 9. *Offic. Brev.* 216. It is not that the sheriff, but that he the bailiff, has the body ready to produce. When the bailiff has made this return, the rule to bring in the body must be on the bailiff, not the sheriff. The profits arising from the execution of these writs belong to the bailiff; he therefore must be answerable for any escape. And it would be extremely unjust that the bailiff, who receives all the advantages from these writs, should subject the

1787.

BOOTHMAN
against
The Earl of
SURREY.

the sheriff to the responsibility by conveying the prisoner to the county gaol. In *Bro. Abr. Tit. Escape, pl. 44*. It is said that, "if a person be imprisoned in execution in a county, or a liberty, the gaoler cannot carry him out of the county or liberty, unless in some special case (which means by *habeas corpus*, or the like); and if he does, the prisoner may have an action of false imprisonment." Then the moment this prisoner was carried out of the defendant's bailiwick, he had a right to bring an action of false imprisonment against the defendant. If so, the defendant cannot justify his conduct. Suppose an escape had happened after the prisoner was out of the defendant's jurisdiction, and in the body of the county, before he was lodged in the county gaol, an action for the escape could not have been maintained against the sheriff. It is perfectly well settled that, if the prisoner be not lodged in the prison, it is a sufficient excuse to a sheriff to return that the prisoner was rescued by force before he was carried to gaol: but if he be once lodged within the walls of the prison, such a rescue by force is no excuse to the sheriff (a). Then suppose a prisoner be arrested on mesne process by the defendant within his jurisdiction, the party would be entitled to an action of escape if the prisoner were rescued after he was imprisoned; and if the rescue were made while the defendant was taking the prisoner from the gaol within his bailiwick to the county gaol, to hold that the sheriff would be answerable, would be to subject him to an action of rescue to which he would not otherwise be liable, since the prisoner was never lodged within the walls of his prison.

Lambe, contra. The object of the execution is that the person named in the writ of *capias ad satisfaciendum* shall be ready to be produced whenever the party shall call for a return of the writ. Then it is perfectly immaterial to the plaintiff whether the prisoner be in the custody of one person or of another, provided he is forth-coming to answer the exigency of the writ. If the bailiff had permitted the prisoner to go at large after he was once arrested, or had not conducted him by the nearest way to the county gaol, and in the way the prisoner had escaped, the defendant would have subjected himself to an action of escape. But the question in this case is, whether the defendant, having delivered the prisoner into the actual custody of the sheriff, who made no objection to receive him, is or is not liable to this action.

(a) 1 *Stra.* 435. 1 *Ro. Abr.* 807. D. 1.3.

of escape for thus lodging the prisoner in the county gaol. It is true that the bailiff of a particular district is in some respects like a sheriff, but he is not so to all purposes. The sheriff is the superior officer; and in cases of this kind the writ first goes to the sheriff, who makes out his mandate to the bailiff, requiring him to arrest the prisoner *so that he, the sheriff, may have his body at the return of the writ*. The sheriff therefore is answerable for the execution of the writ. In *Bro. Abr. Title, Retorne de Briefe*, pl. 35 (a), it is said that where the sheriff returns *quod mandavit ballivo de D. qui respondit quod cepit corpus*, &c. and has not the body at the day, the bailiff is bound to bring in the body, and not the sheriff, *per Hill*: but *per Hank*; he ought to deliver him to the sheriff, and he to bring him in *as an officer immediate*: as upon a *fieri facias* the sheriff commands the bailiff to levy the money, and deliver it to the sheriff, so that the sheriff may have it at the day: *Thirn* indeed agreed with *Hill*: but it does not appear what was done in that case; and the question seemed to be doubted. However the sheriff must be considered as the immediate officer of the court; he must return the process; and if the bailiff complies with the sheriff's mandate by arresting the prisoner, so that the sheriff may have him at the return of the writ, he discharges his duty. Notwithstanding there are several exclusive jurisdictions in the county of *Middlesex*, all prisoners are taken to the county gaol; and there never was an instance of any action having been brought against any bailiff of these particular liberties for delivering the prisoner over to the sheriff of the county. And if it be objected that this case cannot be compared to those, because there are no prisons within those liberties; the obvious answer is, that if the bailiffs of those liberties were bound to keep the prisoners after they were arrested, they would be compellable to make a gaol for the safe custody of such prisoners. The argument drawn from the case in *Brooke* is not applicable here, that the gaoler would subject himself to an action of false imprisonment for carrying the prisoner out of the county or liberty, because in this instance the prisoner was not carried out of either; he was only detained in the defendant's bailiwick till he could be delivered over to the sheriff according to the exigency of the writ. The case of *Crompton v. Ward*, cited from *Strange*, does not prove that because the sheriff was not liable to an action of escape, since the prisoner was never lodged in his gaol, the bailiff shall be liable; but the very re-

1787.

BOOTHMAN
against
The Earl of
SURRY.

(a) 11 Hen. 4. 43.

1787.

BOOTHMAN
 a. ainst
 The Earl of
 SURRY.

verse of that argument arises, namely, that if it would be a good justification to the sheriff, it will equally justify the bailiff. Though it be true, as has been said, that no return by a bailiff of facts such as are here pleaded is to be found in the books, yet it is to be observed that this is the first instance in which such an action as the present has been brought, which circumstance has been allowed to have great weight in a variety of cases. And this action is not entitled to any favor, as it is against the owner of a particular district, and especially as the prisoner is at this moment in the safe custody of the sheriff.

ASHHURST, J.—It being admitted that this is the first action of the kind, we must have recourse to the books of entries and the returns of writs, which are the best authorities in the absence of decided cases. Now it appears from the *retorna brevium* and the *officina brevium*, that when the sheriff returns that he has commanded the bailiff, and returns the bailiff's answer, he is discharged; so that this court must take notice of particular liberties. The sheriff is likewise bound to take notice of all the liberties within his county; and if he were to infringe on any of them, he would subject himself to an action by the owner of the franchise. Therefore when a writ is directed to him to be executed within any liberty in his county, all that he can do is to command the bailiff of that liberty to execute the writ; but he is not answerable for the acts of the bailiff. And after the sheriff has returned the bailiff's answer to him, the plaintiff in the original action cannot rule the sheriff to bring in the body, but the bailiff himself must be ruled. The sheriff has no right to take bail for the appearance of any person arrested within any liberty in his county; so that he has no means of bringing in the body. As far as the old authorities go, it appears that the execution was complete by the defendant's arresting the prisoner within his bailiwick; if so, the prisoner could not be removed to the sheriff of the county without some legal warrant. This is as much an escape in the defendant, as if he had carried the prisoner into any other county. On the whole therefore I am of opinion that this action is well brought, that the plea contains no sufficient answer, and that there must be judgment for the plaintiff.

BULLER, J.—It has been argued for the defendant that the circumstance of this action being brought against the bailiff of a liberty is in favor of the defendant: but if any thing depended upon favor, I think that circumstance weighs against him; for
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he is the owner of a particular liberty which takes away so much from the general jurisdiction of the sheriff, and therefore is entitled to no favor. However in this case I am clearly of opinion that there must be judgment for the plaintiff. Formerly there was some doubt, whether the bailiff of a liberty, or the sheriff, should be amerced, if the sheriff returned that he had commanded the bailiff of the liberty, who answered that he had taken the body, and had not the body there. 2 H. 4. 16. *Kitch. Ret. Brev.* 568. Then *Kitchen* proceeds to say, "See 11 H. 4. fol. 41. that the bailiff shall be amerced, and not the sheriff." He cites also 5 Ed. 4. 6. And in 47 Ed. 3. 25. 14 Ed. 4. 1. & 36 H. 6. 1. a *distringas ballivum* was awarded to bring in the body. So that notwithstanding the doubt in 2 H. 4. 16. yet in the other cases the court agreed that the *distringas* should go against the bailiff, and not against the sheriff. If the *distringas* goes against the bailiff to have the body of the defendant at the return of the writ, he ought to have the custody of the body in the mean time; for if he were obliged to suffer the body to go out of his custody in the mean time, it would be absurd to call on him for a return of the writ. There are several cases collected in *Kitchen* (a), 8 Hen. 6. 56. 4 Hen. 6. 25. and others, Where it is said that, if the bailiff make a return to the sheriff which is bad in law, and the sheriff return it, he shall be answerable, because he is bound to know what the law is; therefore he should return that the bailiff made no return. When the bailiff has once arrested a defendant, he, and not the sheriff, is afterwards called on to bring in the body. And it would be monstrous if the law were otherwise; for then the bailiff would have all the profits and advantages without bearing the burden, which he would by these means throw on the sheriff. But the profits are in respect of the risk he runs; and here the defendant, having arrested the prisoner, must be answerable.

GROSE, J.—In *Brook's Abridgment*, Title, *Retorne de Briefe*, there are many instances where the sheriff, on being called upon to return a writ, is allowed to set out the return which the bailiff of a liberty made to him. And the cases where it appears that the sheriff has been amerced, are for not taking care that the bailiff made a good and legal return to him. The court first look to the sheriff for the execution of a writ; but if the defendant be within a bailiwick, a peculiar jurisdiction, the sheriff

1787.

BOOTHMAN
against
The Earl of
SURREY.

(a) 568. 3d Edition.

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1787.

BOOTHMAN
against
The Earl of
SURRY.

makes out his mandate to the bailiff, who then becomes answerable. In *Boyton's* case (a), where the bailiffs of a particular district in *Suffolk*, in bringing the plaintiff to *Westminster*, at the return of the writ, carried him at his own request to *Lambeth*, which was out of the way from *Suffolk* to *Westminster*, the question was whether that was not an escape. I only mention this case to shew that as the bailiffs of a peculiar jurisdiction had arrested the prisoner, they (not the sheriff) were called on to return the writ. In the present case the defendant, having carried the prisoner out of his bailiwick, has subjected himself to an action for the escape. Instead of delivering the prisoner into the custody of the sheriff, he should have kept him within his own bailiwick; and then he should have made his return to the sheriff, which the sheriff would have returned to this court. The defendant receives all the profits arising from the execution of writs within his privilege, and therefore he is liable to all the disadvantages attending it.

Chambre then observed, that the doubt in the ancient cases whether the sheriffs or the bailiffs should be amerced was removed by the statute 27 *Hen. 8. c. 24.*; the ninth section of which enacts, that the amerciaments for insufficient returns of writs by bailiffs of liberties shall be put upon the heads of such bailiffs, and not upon the sheriffs.

Per Curiam.

Judgment for the plaintiff.

(a) 3 Co. 43.

Wednesday,
June 12th.

The KING against The Inhabitants of MATTINGLEY.

Where *A.* contracted for the purchase of a copyhold estate for 39 l. mortgaged to another person for 32 l. and paid 7 l., and was admitted to the estate subject to the mortgage, he did not gain a settlement by it under 2 *Geo. 1. c. 7.*

THE paupers *W. Wheatley*, *Elizabeth* his wife, and *D.* their son, were removed by an order of two justices from *Mattingley* to *Heckfield*, both in the county of *Southampton*. On appeal, the sessions quashed the order of justices, subject to the opinion of the court of King's Bench on the following case.

On the 18th June 1769, the pauper *William Wheatley*, the husband of *Elizabeth*, and the father of *Daniel*, mentioned in the order of removal, came into the parish of *Mattingley*, with a certificate of that date, acknowledging them to be settled in the parish of *Heckfield*. The said *William Wheatley*, his said wife and son, continued to live in the said parish of *Mattingley*, until the time of the order of removal. Whilst he continued

tinued to reside in *Mattingley*, and a short time previous to the 3d *August* 1780 the said *W. Wheatley* contracted with *John Ironmonger* for the purchase of a copyhold tenement with the appurtenances, situate in *Mattingley*, which said copyhold tenement with the appurtenances had been, previous to such contract, mortgaged to one *Thomas Bailey* for the sum of 32*l.* and lawful interest, which said mortgage money was unpaid at the time of such contract. The contract between the said *W. Wheatley* and *John Ironmonger* was that the said *W. Wheatley* should pay the sum of 39*l.* 17*s.* 6*d.* for the said tenement with the appurtenances, which said last mentioned sum was inclusive of the said sum of 32*l.* so due on the said mortgage. In pursuance of such contract the said *W. Wheatley* paid the said *John Ironmonger* the sum of seven pounds seventeen shillings and six-pence, which with the said sum of 32*l.* to be paid to the said *Thomas Bailey* by the said pauper made the aforesaid sum of 39*l.* 17*s.* 6*d.* On the 3d of *August* 1780 the said *W. Wheatley* was duly admitted to the said premises (*prout* the admission; wherein it appeared that the lord granted the estate on the surrender of *J. Ironmonger* to *W. Wheatley*, subject to a mortgage surrender for securing 32*l.* and interest) and afterwards entered into possession of the premises, and continued possessed thereof for four years, and during such time paid the said *Thomas Bailey* two years interest of the said sum so due on the said mortgage, which was all the interest the said *Thomas Bailey* received on the said 32*l.* after the time of the said purchase. He never paid off the said mortgage money, and sometime in the year 1784 he delivered up the possession of the said premises to the said *Thomas Bailey*, the mortgagee.

A rule having been obtained to shew cause why the order of sessions should not be quashed,

Milles shewed cause. The question is, whether this contract for the estate at *Mattingley* be or be not a purchase within the statute 9 *Geo.* 1. *c.* 7. The value of the estate purchased by the pauper is more than sufficient to satisfy the words of the statute; for the case states that the pauper contracted with the vendor for the purchase of the estate for 39*l.* The value then being sufficient, and the money *bonâ fide* paid to the vendor, it is not necessary under the statute that the money should be paid out of the pocket of the purchaser to the vendor; it being sufficient if the vendor be satisfied, whether by payment at the time, by a debt liquidated, or by any other mode; the manner in which the money is paid

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1787.

The KING
against
MATTING-
LEY.

1787.

The KING
against
MATTING-
LEY.

is perfectly immaterial. In the case of the King v. the Inhabitants of *Stockland* (a), a sum due by bond and simple contract to the intestate of the mortgagor was permitted to be coupled with a sum due to the mortgagee, making together 35*l.* for the purchase of the estate: And the court held that, as the consideration which exceeded 30*l.* was *bonâ fide* paid, it was clearly within the words of the act. So if a person purchase an estate, and borrow the money to pay for it, even though he mortgages it, and leaves the mortgage upon it, still it is a purchase for 30*l.* as was held in *The King v. Tedford* (b); where Lord *Hardwicke* said "the act is confined to purchases under 30*l.* *bonâ fide* paid, consequently if the vendor had such consideration of 30*l.* paid to him, it is not within this act. Now in the present case the consideration was 39*l.*, and was *bonâ fide* paid to the vendor. And it would be pretty hard to say, that the justices had a power upon this act to enquire whether the purchaser borrowed the money or not. In the King v. the Inhabitants of *Duncomb*, Lord *Mansfield* (c) recognized the *Tedford* case, and said it "was in fact a purchase of an estate of the value of 39*l.* though the purchaser borrowed part of the money, upon mortgage, to pay for it." In the case of a mortgage, the mortgagee has nothing to do with the land; it is considered merely as a security for his money; and it makes no difference, as far as respects this question, whether the money borrowed by the purchaser be paid or not. The case of the King v. *Tedford* is applicable throughout, with this difference only, that this is a much stronger case. There the sessions stated the purchase to be fraudulent, which this court over-ruled; here no fraud is stated: It did not appear in that case that any interest was ever paid; here it is stated as a fact that the pauper paid two years interest to the mortgagee, which clearly shews that the mortgagee considered him as the person actually responsible for the mortgage money. The mortgagee was privy to the purchase, by permitting the money to remain a charge on the estate, and by suffering the purchaser to be admitted.

Burrough, *contra*, was stopped by the court.

ASHHURST, J.—The only question in this case is, whether the purchase made by the pauper is in fact of the value of 30*l.* Taking all the facts disclosed by this special case into consideration, I am clearly of opinion, that it was not a purchase for 30*l.* but only for 7*l.* 17*s.* 6*d.* For the pauper only purchased the

(a) Burr. S. C. 169. 2 Str. 1162.

(b) Burr. S. C. 59.

(c) Burr. S. C. 557.

interest

interest of the mortgagor subject to the mortgage. Now the estate was mortgaged for 32 *l.*; therefore the mortgagor's interest subject to that was only 7 *l.* 17 *s.* 6 *d.* which was the whole of the pauper's purchase. The estate having been mortgaged for 32 *l.* the instant the mortgagee got into possession he might have gained a settlement upon it: If so the mortgagee was a purchaser for 32 *l.* and the pauper only purchased subject to that charge. In the *Tedford* case, it was only decided that, if a man purchased an estate for 30 *l.* *bonâ fide* paid, the court would not enquire how the purchaser came by the money: but here the purchaser did not *bonâ fide* pay 30 *l.* And that circumstance distinguishes this case from that of the *King v. Tedford*. If the pauper, previous to the contract for the purchase, had given the mortgagee a personal security for the mortgage money, then he would in fact have bought an estate for 30 *l.*, though part of the purchase money would have been borrowed on mortgage; then the words of the statute would have been satisfied, and the pauper would consequently have gained a settlement in the parish of *Mattingley*.

(a) GROSE, J.—This case depends upon the construction of the statute of 9 *Geo.* 1. c. 7. Now it is to be observed that that statute does not give a settlement to a man purchasing an estate of the value of 30 *l.* but it enacts, “that no person shall be deemed to acquire a settlement in any parish by virtue of any purchase of any estate in such parish, whereof the consideration for such purchase doth not amount to the sum of 30 *l.* *bonâ fide* paid, for any longer time than he shall inhabit in such parish.” Then the question here is, Whether the pauper has *bonâ fide* paid 30 *l.* for the purchase of this estate. Now it is not even pretended that the sum of 30 *l.* has been paid at all; but on the contrary it appears on the case that no more than 7 *l.* 17 *s.* 6 *d.* has in point of fact been paid. Then it has been argued that if the vendor has been satisfied 30 *l.* for the sale of his estate, it is a purchase within the statute 9 *Geo.* 1. But that is not the true construction of the act; for the question must be, whether the purchaser is able to pay, or has *bonâ fide* paid, 30 *l.* I agree that, if he has *bonâ fide* paid the purchase money, we will not enquire how he gained it, nor whether he mortgaged the estate for the payment of it. That might be a question of fraud for the consideration of the Justices at the sessions; and if it appeared to be

1787.

The KING
against
MATTING-
LEY.

(a) Mr. Justice BULLER was sitting at *Guildhall* this day.

1787.

The KING
against
MATTING-
LEY.

a fraudulent purchase, no settlement could be acquired by it. In the case of the *King v. the Inhabitants of Tedford* there was a purchase for 39*l*; the purchase money was in fact paid, and it was the money of the pauper, though part of it was borrowed on a mortgage of the very estate which he purchased; And that was properly holden to be a *bonâ fide* purchase of an estate for 30*l*. But here it cannot be contended that the pauper gained a settlement in the parish of *Mattingley* by virtue of a purchase for 30*l*. when in point of fact that sum has not been paid. In order to constitute a purchase within the 9 *Geo. 1.* the sum of 30*l*. must not only be paid in point of fact, but it must be *bonâ fide* paid.

Rule absolute.

Thursday,
June 14th.

ROOKE against the Earl of LEICESTER.

If on the return of a writ in a personal action the defendant cast an effoign, which is not adjourned to a particular day, and it is not quashed, and the plaintiff deliver his declaration on the first day of the following term, the defendant is not intitled to an imparlance.

THE plaintiff sued out a writ against the defendant, who was a peer of *Great Britain*, in a personal action, returnable the second return of *Easter Term*. At the return the defendant cast an effoign, which was not adjourned to any particular day. And on the first day of *Trinity Term* the plaintiff delivered his declaration.

Baldwin moved that the defendant might have an imparlance to *Michaelmas Term*, the declaration not having been delivered before the effoign day of *Trinity Term*.

Lane shewed cause.

BULLER, J.—In the case of *Argent v. the Dean and Chapter of St. Pauls* (a), it was held first, that a corporation was not entitled to an effoign, and secondly, that there could be no effoign in a personal action; and there the court quashed the effoign. Where an effoign is cast, the parties should adjourn it to a particular day; but as that was not done here, and as no motion was made to quash the effoign, the declaration could not be delivered till the first day of the term. But the defendant is not entitled to an imparlance where the plaintiff is prevented from declaring before the effoign day by an effoign cast. And the court will be glad to use any means to prevent such a delay by the defendant.

Rule discharged.

(a) E. 23 G. 3. B. R.

SAMBIDGE

1787.

Thursday,
June 13th.SAMBIDGE *against* HOUSLEY in Error.

AFTER verdict in an action of debt in the court of Common Pleas, a writ of error was brought, returnable the last return of *Easter* term, and bail being perfected, a rule was given by the defendant in error, signed by the clerk of the errors, to certify the record in eight days, otherwise a nonpros would be entered. This rule was served on the 18th of *May*, and the record was certified before the first day of this term. The defendant, after the record was certified, and three days before this term, sued out a *scire facias quare executionem non*, tested the last day of *Easter* term, and returnable the first day of this term, and a warrant thereon was served on the plaintiff the first day of this term. On the same day the plaintiff was also served with a rule to appear to the *scire facias*, and another rule to assign errors on record.

Runnington obtained a rule to shew cause why the *scire facias* should not be quashed for irregularity, on two grounds; first that the record should not have been certified before the first day of the present term, till which time the *scire facias* should not have been sued out; and secondly, that the rule to assign errors should not have been given before the rule to appear to the *scire facias* was out.

Marshal shewed cause, insisting that the rule signed by the clerk of the errors to certify the record in eight days, and the compliance of the officer were sufficient evidence of what the practice was. And though the rule on the officer was to certify the record in eight days, yet when it is certified here, the party may proceed upon it. As to the rule to appear to the *scire facias*, and that to assign errors, being both served on the same day, they are perfectly consistent, because the object of both is to compel an assignment of errors. The rule to appear to the *scire facias* is only to bring the plaintiff into court, as he has no day in court given him by the writ of error. But if the plaintiff does not assign errors before the rule expires, and suffers judgment to pass upon two *nihils*, though the defendant may sue out execution, yet he will be entitled to no costs in error, and the writ of error may still be proceeded upon. And therefore the defendant gives a rule on the transcript to assign errors, and if the plaintiff does not assign errors in four days, the defendant may sign a *nonpros*,

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If the defendant in error from C. B. into B. R. give an eight day rule to certify the record, the record may be certified in less time, though the rule expire in vacation; and a *scire facias quare executionem non* having been issued immediately upon the record being certified, returnable the first day of the following term, the defendant may serve the plaintiff in error on that day with a rule to appear to the *scire facias*, and a rule to assign errors.

1787.

SAMBIDGE
against
HOUSLEY.

which will entitle him to the costs in error. But without a rule to assign errors a writ of error cannot be *nonpross'd.* 3 Burr. 1772.

BULLER, J.—The proceedings are regular on both grounds. As to the first; the record was brought into this court in the vacation; then it remains as a transcript of the last term. It is not necessary that the officer should have eight days allowed him to transcribe the record; it is his duty as an officer of the court to transcribe as soon as he can. And though eight days are mentioned, which he is not to exceed, yet if he can certify the record in less time, he should do it. Then as to the other point, there is no ground for it as an irregularity; the two rules are consistent, being both for the same purpose.

Per Curiam.

Rule discharged.

Thursday,
June 14th.

The KING against RICHARD THOMPSON.

In a conviction on the 5 An. c. 14. f. 4. stating (according to the precedent in 2 Burn. 308.) the information against the defendant on the 8th December 1786, the appearance of the defendant on the 9th, after being summoned, and the plea of *Not Guilty*; and then proceeding as follows; nevertheless, on the said 9th day of *December*, in the year aforesaid, at &c. one credible witness, to wit, *Richard Taylor* of &c. cometh before me the said justice, and before me the same justice, upon his oath on the Holy Gospel to him then and there by me the aforesaid justice administered, deposeth, sweareth, and upon his oath aforesaid affirmeth and saith, that the defendant on the 7th day of *December* aforesaid, in the year aforesaid, at &c. [negating the qualifications of the 22 & 23 Car. 2. c. 25. f. 3.] *did keep and use a gun to kill and destroy the game*; and thereupon the said *Thompson*, (the defendant,) the said 9th day of *December*, in the year aforesaid, at, &c. before me the same justice, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid, is convicted, and for his offence aforesaid hath forfeited the sum of five pounds, to be distributed as the statute aforesaid doth direct, &c.

Where the conviction after stating the evidence, stated,
“thereupon
“the defend-
“ant on, &c.
“at, &c. be-
“fore me,
“&c. by the
“oath of one credible witness, according to the form of the statute is convicted,” it was held to be an adjudication of the justice that he is convicted of the offence.

THIS was a conviction on the 5 An. c. 14. f. 4. stating (according to the precedent in 2 Burn. 308.) the information against the defendant on the 8th December 1786, the appearance of the defendant on the 9th, after being summoned, and the plea of *Not Guilty*; and then proceeding as follows; nevertheless, on the said 9th day of *December*, in the year aforesaid, at &c. one credible witness, to wit, *Richard Taylor* of &c. cometh before me the said justice, and before me the same justice, upon his oath on the Holy Gospel to him then and there by me the aforesaid justice administered, deposeth, sweareth, and upon his oath aforesaid affirmeth and saith, that the defendant on the 7th day of *December* aforesaid, in the year aforesaid, at &c. [negating the qualifications of the 22 & 23 Car. 2. c. 25. f. 3.] *did keep and use a gun to kill and destroy the game*; and thereupon the said *Thompson*, (the defendant,) the said 9th day of *December*, in the year aforesaid, at, &c. before me the same justice, by the oath of one credible witness aforesaid, according to the form of the statute aforesaid, is convicted, and for his offence aforesaid hath forfeited the sum of five pounds, to be distributed as the statute aforesaid doth direct, &c.

This was argued last Term by *Cockell, Serjeant*, against the conviction, and *Lambe* in support of it; when it was objected,

that

that it did not appear upon the conviction of what the defendant had been convicted; It is only said, "thereupon the defendant on &c. before me the same justice by the oath of one credible witness according to the form of the statute is convicted, and for his offence aforesaid hath forfeited &c." This is only a conclusion of law, and not an adjudication of the justice. There is nothing to connect it with that which precedes it; such as that "he is convicted of the premises," or "in manner and form aforesaid." And they cited the following cases; *The King v. Jarvis*, 1 *Burr.* 148. *The Queen v. Matthews*, 10 *Mod.* 26. *The King v. Pickles*, cited in 1 *Burr.* 153. and the *King v. Green*, H. 24. G. 3. B. R. And it was observed that this conviction was taken from the precedent in *Burn (a)*.

The Court were clearly of opinion that there was no ground for that objection; but they desired it might be argued again on another objection, which they suggested to the counsel; whether the evidence was sufficiently set forth, so that the court could see by what act the defendant had incurred the penalty; for they observed that the act of keeping a gun was in itself ambiguous, and that it must be shewn to be kept for the purpose of killing game, in order to bring the party keeping it within the act of parliament; It was not like keeping a greyhound or a snare which could not be kept for any other purpose, and which was expressly prohibited by the act.

Wood now argued against the conviction. It is a fatal objection that the evidence, on which the conviction is grounded, is not particularly set forth. The evidence which is stated is merely a repetition of the information. Only the result arising from the facts is set forth; but every part of the evidence ought to have been specially shewn that this court might have had an opportunity of judging whether the justice convicting drew a legal and proper inference from the facts sworn to, so as to bring the defendant within the penalty of the act of parliament. In the case of the *Queen v. Green (b)*, it was objected that the evidence, upon which the defendant was convicted, was not set forth. It was only said, that the witness was sworn *de veritate præmissorum*, without saying, "what the answer of the witness was." And though it was said, that it did appear, from what was sworn to the justice, that he was guilty, yet it was answered, that it ought to have appeared so to the court from the nature of the

1787.

The KING
against
THOMPSON.(a) 2 *Burn.* 328.(b) 10 *Mod.* 213.

1787.

The KING
against
THOMPSON.

evidence specially set forth. And the court were of that opinion. In the case of the King v. *Killett* (a), this doctrine is recognized, where it was objected, that the justice only stated "that the charge as set forth, being duly proved before him &c." and the objection was held to be fatal, because he did not set forth the evidence particularly. It was there determined, "that upon a conviction, it is necessary, that the evidence should be set out, that the court may judge whether the justices have done right." The same law is declared in the case of the King v. *Vipont* (b). Now in the present case it does not appear for what purpose the gun was kept, or in what manner it was used. The act of keeping a gun is equivocal; it may be used for other purposes than that of killing game; and therefore the facts of keeping and using should have appeared by the evidence, in order that this court might see whether it was kept and used for the purpose of destroying game. This is not like keeping a lurcher, the bare keeping of which is evidence of the purpose for which it is kept. In the King v. *Filer* (c), a difference was taken as to keeping a dog, which could only be to destroy the game; and keeping a gun which a man might do for the defence of his house. And though it is here said, that "the defendant used the gun, &c." it ought to have appeared by the evidence how he used it. The evidence, which was given before the justice, could not have been given in the manner in which it is stated in the conviction; for this evidence is the language of the act of parliament: and even if it were given in this general way, the justice ought to have refused it. If this evidence were allowed to be sufficient, the court will never on any future occasion be able to judge whether a defendant has been properly convicted, because the evidence will always be stated in the very words of the information.

Chambre, contra, did not dispute the general rule that it was necessary to state the evidence particularly in a conviction, but insisted that in the present case the evidence was sufficiently stated. The case of the King v. *Filer* is not applicable to the present; for there it was only said that "keeping a gun" was not sufficient to bring the defendant within the act of parliament, unless he kept it for the purpose of destroying game, because he might keep it for the defence of his house; but here it is expressly stated that the defendant "kept and used the gun to kill and destroy the

(a) 4 Burr. 2063.

(b) 2 Burr. 1163.

(c) 1 Stra. 496.

game,"

game," so that it is here positively sworn as a fact that the defendant *used* it for the purpose of killing game. In the case of the King *v. Hartley* (a), where the defendant had been convicted of "keeping and using a dog, called a greyhound, for the "destruction of game," this very objection was taken and overruled. Besides a very strong argument arises from considering that this form of conviction has been almost universally used on similar occasions; it follows the precedent in *Burn's Justice*. This was allowed to have considerable weight in the case of *Jones v. Smart* (b); and if this conviction were to be quashed, every conviction which has been made for many years past, would be removed hither by *certiorari*, in order that they might be overturned on the same objection; and the several justices who have proceeded upon them would be liable to actions by the respective offenders.

ASHHURST, J.—If this were a new case, I should most undoubtedly be of opinion that this conviction could not be supported; because I think that the evidence should be set forth particularly, that we may judge whether the justice has convicted upon proper evidence. The fact of keeping or using the gun for the purpose of destroying game should appear: but it is only stated here that the defendant kept and used, &c. which is the result of his evidence. Then whether he kept it for the purpose of killing game is likewise a question of law; for an ignorant witness in the country might fancy that a woodcock or a rabbit was game. So that it seems to me that permitting this general evidence to be stated, is allowing the witness to give his sentiments on the law as well as on the facts. But at the same time, as the precedents are usually in this form, and as the conviction in the King *v. Hartley* was similar to the present, it is better to support this conviction, than by quashing it to overturn all former precedents.

BULLER, J.—If this precedent had never been adopted, I should have been of opinion that the evidence should have been fully set forth: But after so many convictions have been made in the same form, it would be dangerous to quash the present. The distinction taken in the King *v. Filer* is good law: It is not an offence to keep or use a gun, unless it be kept or used for the purpose of killing game. But it is here stated by the evidence "that the defendant did keep and use a gun to kill and destroy "the game." As to the other question respecting game; I

1787.

The KING
against
THOMPSON.(a) *E. 22 G. 3. B. R.*

(b) 1 Vol. 44.

1787.

The KING
against
THOMPSON.

cannot agree that the witness in swearing that the defendant used a gun to destroy game would be swearing to a question of law, because it is settled by act of parliament, and every man is bound to know what is game: If he swears that to be game, which is not so in law, he would be guilty of perjury: Game must be understood in it's legal sense.

GROSE, J.—I cannot give my consent to support this conviction. The justice should return particularly all the facts and the conclusion in the conviction; first the information, the summons, the appearance or the defendant's default in not appearing, that the information was read to the defendant, that he was asked what he had to plead, the whole of the evidence particularly, and the adjudication. The witness should swear to the facts, and not to the law. And in this case it is almost incredible that the witness should have sworn in the manner in which this evidence is set out: The justice should not have received it, if it were offered in this general way; but should have questioned the witness as to the manner in which this gun was kept, for what purpose it was used, and what particular kind of game he killed or attempted to kill. All these particulars should have been specially set forth, in order that we might judge whether they constituted an offence within the act of parliament. Here the witness swore to the law, namely "that the defendant kept "and used a gun to kill and destroy the game." And in the case of the King *v. Baker* (a), a conviction for taking pilchards was quashed, because the witness swore generally that the defendant was *guilty of the premises*, which was taking upon himself to swear to the law. Now the reasoning in that case applies strongly to the present, for the evidence here stated only amounts to that, that the defendant is guilty of the premises. I confess indeed that the case of the King *v. Hartley* is of considerable authority the other way. But I would rather choose to decide this case according to that of the King *v. Baker*, because I think nothing can be more mischievous to the country than suffering a justice of the peace to state the conviction generally. And there can be no inconvenience in stating particularly the whole matter for the opinion of this court, if the justice does not exceed his authority. Although the present conviction cannot be quashed, because my brothers have given their opinions in support of it, yet I did not choose that this question should pass *sub*

(a) 1 *Str.* 316.

silentio; especially as this declaration of my opinion may have the effect of inducing justices of the peace in future to state the whole matter upon the record.

The Court however entertaining some doubt on another part of the conviction, namely, whether it sufficiently appeared that the evidence was given in the defendant's presence, desired the matter might stand over. On the next day

ASHHURST, J. said, On looking into the cases, we find that this objection has before been made; and the court have held that in cases circumstanced like the present they will intend that, as the whole proceedings are stated to have passed on the same day, the evidence was given in the presence of the defendant. As to the principle drawn from the old cases, that the court will be astute in discovering defects in convictions before summary jurisdictions, there seems to be no reason for it. Whether it was expedient that those jurisdictions should have been erected was a matter for the consideration of the legislature; but as long as they exist we ought to go all reasonable lengths to support their determinations. Therefore in whatever light they may have formerly been viewed, yet the country are now convinced that they derive considerable advantage from the exercise of the powers delegated to the justices of the peace; and in modern times they have received every support from the courts of law. Therefore I see no reason for altering the opinion which I gave yesterday.

BULLER, J.—It has been decided in several cases that there is no foundation for this objection. The first of them was the King *v. Aiken* (a), where the conviction, as far as the evidence went, was precisely similar to the present, the court said "It may be presumed that the witness was examined in the defendant's presence." The next case was that of the King *v. Kempson* (b): There the same objection was made, but the whole transaction appearing to have passed before the magistrate on the same day, *Aston*, J. said, "Enough appears upon this conviction to shew that the witness was examined in the presence of the defendant. It must be supposed that all that passed was at one and the same time." Besides that the precedent in *Burn* is in the same form. With respect to the other question, that also has been decided by the case of the King *v. Hartley* (c): There the first objection was, that the defendant had sworn to the law; for that what was game was a question of

1787.

The King
against
THOMPSON.

(a) 3 Burr. 1785.

(b) Cowp. 241.

(c) H. 22 G. 3. B. R.

law;

1787.

The King
against
THOMPSON.

law; but that objection did not prevail. The second objection was, that the evidence was not sufficiently set forth, because the manner of keeping or using the greyhound did not appear, and the conviction only pursued the language of the act of parliament. Upon that occasion, Lord *Mansfield* said, convictions must be precise, that the court may see that they fall within the jurisdiction of the justices. There are two offences described by the act of parliament, *keeping*, or *using*, for the purpose of destroying game. There may be a keeping without its being for the purpose of destroying game; therefore there should be evidence of the purpose for which it is kept. But the evidence states, that the defendant *used* as well as *kept* the greyhound for the destruction of game. So that this case goes the whole length of deciding the other objection which was made yesterday (a).

GROSE, J.—As the precedent in *Burn* (though it seems to me a faulty one) has been recognized by this court in the case of the King *v. Hartley*, of which I was not aware before yesterday; I think it must be supported. It might be highly inconvenient to overturn it; and I should be sorry that any opinion of mine should shake the authority of an established precedent; since it is better for the subject that even faulty precedents should not be shaken than that the law should be uncertain.

Conviction affirmed.

(a) *Vid.* 2 *Str.* 1098. 1 *Wilf.* 315.

Friday,
June 15th.

HEATHCOTE and Others *against* CROOKSHANKS.

An agreement between a debtor and his creditors, that they will accept a composition in satisfaction of their respective debts to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand.

ASSUMPSIT on a promissory note; and for money had and received, &c. Pleas, the general issue; and secondly, that the plaintiffs ought not to have or maintain their action thereof against the defendant to recover any more than the sum of 5 *l.* 5 *s.* because the defendant on the first day of *June*, 1785, at &c. was indebted to the said plaintiffs, by virtue of the several promises and undertakings in the said declaration mentioned, in the sum of 18 *l.* 14 *s.* and no more, and the defendant afterwards, and before the exhibiting of the bill of the plaintiffs, on &c. was also indebted to divers other persons, (naming them) in certain other large sums of money respectively; and the said defendant being so indebted as aforesaid, was then and there unable

to pay and satisfy to them the full amount of the said several debts, whereof the said plaintiffs, and several other creditors of the said defendant, then and there had notice; And thereupon, on, &c. for the compounding of the debts of the said defendants, it was agreed between the said plaintiffs and the said other creditors before mentioned and the said defendant, that they the said plaintiffs and the said several other creditors should and would accept the payment of 5*s.* 6*d.* in the pound on the amount of their respective debts, such payment to be made within a reasonable time, in full satisfaction and discharge of such their debts. And the said defendant avers, that he in pursuance of the said agreement afterwards and before the exhibiting of the bill of the said plaintiffs, on, &c. the same being within a reasonable time next after the making of the said agreement, tendered and offered to pay and caused to be tendered and offered to be paid to the said plaintiffs the sum of 5*l.* 5*s.* being so much as amounted to 5*s.* 6*d.* in the pound, upon the said sum of 18*l.* 14*s.* the said amount of the said debts so as aforesaid due and owing from the said defendant to the said plaintiffs, and which sum of money so tendered and offered to be paid as last aforesaid the said plaintiffs then and there refused to accept of and from the said defendant: And the defendant from the time of the making such tender always hath been and still is ready to pay, &c. and brings the same into court, &c.

To this plea there was a general demurrer, and joinder.

Shepherd in support of the demurrer. It is an indisputable principle in law, that an accord without satisfaction is not a good plea; All the authorities are to this effect. 1 *Ro. Abr.* Title *Accord.* pl. 11. *Cro. El.* 193. And the mode in which this plea is drawn will not distinguish it from a plea in bar to the whole action; for this is to bar the plaintiff from recovering more than five guineas, which is only a part of the debt really due. This plea of tender is not sufficient, for it should appear that no more than the sum tendered was due; at least the contrary should not appear on the face of the plea. Now, unless this agreement to take a less sum than was due were an absolute discharge of the original consideration, this plea cannot be supported. On the same principle which determines, that an accord without satisfaction cannot be pleaded in bar to the action, it cannot reduce the demand on which the promise is founded. The reason, why accord without satisfaction is no plea, is because the party cannot exchange one cause of action for another

1787.

HEATHCOTE
against
CROOK-
SHANKS.

1787.

HEATHCOTE
against
CROOK-
SHANKS.

of the same nature. Now in the present case, a contract is set up, not by deed, nor of an higher nature than the original one. And though it be not pleaded in total bar of the original debt, yet it is in discharge of it. Not only accord without satisfaction is no bar, but even tender and refusal, after accord, is not sufficient without satisfaction and acceptance. 9 Co. 79. b. For every accord must be full, perfect and complete.

The Court then desired to hear the counsel on the other side.

Law, contra. As to the cases cited, they were relied upon in *Cumber v. Wane* (a), which has since been repeatedly denied by this court to be law. But this is not strictly the case of accord without satisfaction within any of the former determinations; for here was a virtual acceptance by the plaintiff, and a performance by the defendant. In 1 Ro. Abr. pl. 14. It is laid down that an accord to do a certain thing at a particular time in satisfaction of the action, though executory at the time, yet if it be executed, is a good bar to the action. It is clearly established that tender and refusal is in all cases equivalent, as between the parties, to the performance of any act agreed to be done. *Jones v. Barkley*, Dougl. 659. This is not a plea of accord and satisfaction, but it is an agreement among all the defendant's creditors that they will accept a less sum of money in satisfaction of their respective debts; and this is not a *nudum pactum*, for the plaintiff derives a benefit from it, inasmuch as the defendant might otherwise give a preference to his other creditors. This agreement is so far binding as between the several creditors, that if one sues to the prejudice of the rest, they may maintain an action against him. Then if the agreement be good as between the creditors, it is so as between the debtor and any one of them. The actions of all are suspended, which is beneficial to each. This agreement is founded on mutual promises, for which either party may maintain his action. The one agrees to forbear for a reasonable time, and the other to pay at the expiration of a reasonable time. It is a good plea to an action of assumpsit that after the promise the plaintiff discharged the defendant from it (b). If then an agreement to discharge the defendant from his promises without any thing be good, much more will an agreement to discharge the defendant on paying part of the demand be supported. This is like an arbitrament, where a less sum than the whole demand is ordered to be paid: Here is an

(a) 1 Str. 426.

(b) 2 Leon. 214. Cro. Car. 383.

ascertainment of the debt; a security for the payment of it by appropriating a fund for that purpose; and a forbearance of all the creditors to sue in the mean time. In *Case v. Barber* (a), it was said that though in former times the pleading of an accord without execution in the whole was not good; yet now the law being taken, that mutual actions lie on such agreements, such plea shall be allowed: That case indeed was determined upon the statute of frauds. In the case of *Cumber v. Wane*, the court said they would see in all cases that it was a reasonable satisfaction before they would hold it to be good: This then is a reasonable satisfaction, otherwise nothing short of the whole demand can ever be considered a reasonable satisfaction in any case.

ASHHURST, J.—The only question here is, Whether this promise by the plaintiff to take a less sum than the whole demand was obligatory on the party *ab origine*, or whether it was a *nudum pactum* for want of a consideration. I am clearly of opinion, that it was a *nudum pactum* in its creation. Here there is a debt of 20 *l.* due from the defendant, and a promise by the plaintiff to take 5 *l.* only, which is in effect a promise to give defendant 15 *l.* For a promise to forgive the defendant 15 *l.* is like a promise to give that sum. But such a promise is a *nudum pactum* for want of a consideration, and therefore is not binding unless it be executed. It is true indeed, that if *A.* promise to give *B.* 15 *l.* and he actually pays it, he cannot recover it back again; but here the question is, whether an agreement by the plaintiff to take a less sum is obligatory without acceptance. It has been said, that a tender is in all cases equivalent to payment: but that is not so; for if a tender be pleaded in bar of a promise, it is not taken as a payment but as a bar to the action. This agreement is not binding in law: the plaintiff is always entitled to the whole demand. And therefore as this agreement has not been followed up by an actual acceptance, which is negatived by the record, it was not obligatory. And the plaintiff, whether from caprice or any other motive was at liberty to refuse taking less than his whole demand.

BULLER, J.—The question in this case is, whether there is any consideration for the promise as stated in the plea. It has been said by the defendant's counsel that in effect by this agreement the debt was ascertained, a fund was provided for the pay-

1787.

HEATHCOTE
against
CROOK-
SHANKS.

(a) Sir T. Raym. 450. Sir T. Jones 158.

1787.

HEATHCOTE
against
CROOK-
SHANES.

ment of it, and all the creditors were bound to forbear. If the fact had been so, that might have been a good plea: but the reverse appears by the defendant's plea. For first the debt is not ascertained by the agreement; it is only averred that it amounts to so much, nor is any time specified for the payment of it. Secondly, No fund is appropriated for the payment of the debt. If the debtor had assigned over all his effects to a trustee, in order to make an equal distribution amongst all his creditors, that would have been a good consideration in law for the promise: but no such fact appears in this case. Thirdly, It was said that all the creditors were bound by this agreement to forbear: but that is not stated by the plea. It is only alledged that they agreed to take a certain proportion; but that is a *nudum pactum* unless they had afterwards accepted it. In the case, in which *Cumber v. Wane* was denied to be law (a), the party actually accepted. But as the plaintiff in the present case refused to take less than the whole demand, this plea is clearly bad.

Judgment for the plaintiff (b).

(a) *Hardcastle v. Howard*. H. 26 G. 3. B. R.

(b) 1 Lord Raym. 122.

Friday,
June 15th.

In debt for goods sold and delivered the plaintiff declared that the defendant at Westminster in the county of Middlesex was indebted to him in a certain sum for goods sold and delivered, without alleging an express contract, and place where such contract was made; upon special demurrer for these causes the court held the contract and venue well laid.

EMBRY against FELL.

THIS was an action of debt. The first count in the declaration stated, that the defendant on Cr. at Westminster, in the county of Middlesex, was indebted to the plaintiff in the sum of 27. 12 s. 6 d. for divers goods, wares, and merchandizes, by the plaintiff before that time sold and delivered to the defendant at his special instance and request. There were other counts for work and labor, money paid, laid out, and expended, and money had and received, in the same form.

To this declaration there was a special demurrer, assigning the following causes; that the several supposed contracts, on which the said debt above demanded is alleged to have arisen, are not, nor is either of them, sufficiently, or in any manner stated or set forth in the said declaration; and also that it is not stated when or where the said supposed contracts or causes of action or any of them were or was made or arose; and also that it doth not appear that any or either of them were or was made in the county where the venue is laid.

Gibbs, in support of the demurrer, contended that the plaintiff could not recover this demand in debt. He admitted that in

some cases debt would lie for goods sold and delivered, but insisted that this was not one of those cases, for it did not appear that the demand was certain. In *Young and Ashburnham* (a), where debt was brought by an innkeeper for board and lodging, *Anderson*, Ch. J. held that, because there was no agreement between the parties, nor any certain price fixed, an action of debt would not lie. So in the present case, where no previous contract was made for the sale of the goods, *debt* will not lie, though *assumpsit* may be supported on a *quantum valebant*. In *Vaux v. Manwairing* (b), Lord Chief Justice *Parker* said, "debt is upon the contract or sale, but *indebitatus assumpsit* is an action on the promise, and lies only because of the promise. If *A.* bring *indebitatus assumpsit* for 10*l.* for a horse sold, if it were sold for more or less, the plaintiff shall recover what it was sold for: but if debt be brought on that contract, and it turn out to be more or less, the plaintiff cannot recover, for it is a *præcipe quod reddat* so much money in particular." A declaration in debt therefore should state that the debt arose by contract; for a contract is the gist of the action of debt: here no contract appears; the declaration only states, that the defendant was indebted in so much; but if the goods were delivered without any contract, debt will not lie. But even supposing that the court could infer a contract from the words of this declaration, "that the defendant was indebted," yet as the contract is the gist of this action, there should be a venue shewing the place where the contract was made. In *assumpsit* the undertaking is the gist of the action, and there it is necessary to state where the promise was made. For a count for goods sold and delivered could not be supported, if no place were alleged where the promise was made. If then in *assumpsit* it be necessary to state the place where the promise, which is the foundation of that action, was made, it is equally necessary in an action of debt to allege where the contract was made, which is the gist of such an action. But here no place is shewn where the contract was made: the declaration only alleges that the defendant was indebted at *Westminster*, without saying that the goods were sold and delivered at *Westminster*. If the defendant be indebted to the plaintiff, it is a debt every where, but the contract must be made at a particular place, which should be shewn. It would not be sufficient in debt on bond to allege that the defendant was indebted at *Westminster*, without stating that the bond was made at *Westminster*. The general mode of declar-

1787.

EMERY
against
FELL.

(a) 3 Leon. 161.

(b) Fortes. 197.

1787.

EMERY
against
WELL.

ing in debt is a strong confirmation of this argument, since there is not a single instance in any book of entries of any declaration in this form: the regular form is, that whereas the defendant had bought of the plaintiff, &c. to be paid by the defendant at a particular place.

Russell, contra, was stopped by the court.

ASHHURST, J.—It seems to me that the declaration is sufficient. There is a venue laid in the beginning, “that whereas the defendant, at *Westminster*, in the county of *Middlesex*, was indebted to the plaintiff;” that must be taken to be the place where the contract was made for the sale of the goods. The venue goes to the whole declaration.

BULLER, J.—As to the first objection, that no contract is stated in the declaration; the words “sold and delivered,” imply a contract; for there cannot be a sale, unless two parties agree. This would be sufficient on a *mutuatus*, or for money lent. As to the other point; the venue cannot be laid in a plainer manner than in the present case; the declaration states that the defendant at *Westminster*, in the county of *Middlesex*, was indebted to the plaintiff. If it were necessary for the plaintiff to prove that the contract was made at *Westminster*, it may be done under this description: but it is not necessary; for it may be proved any where, which shews that the venue is merely added for form’s sake; and it is sufficiently laid here.

GROSE, J.—declared himself of the same opinion.

Judgment for the plaintiff.

Tuesday,
June 19th.

WAY against MODIGLIANI.

If a ship insured from a certain time sail before the time on a different voyage from that insured, the assured cannot recover, though she afterwards get into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached.

THIS was an action on a policy of assurance on the ship *Polly*, “at and from the 20th October 1786, from any ports in New-
“*foundland to Falmouth*, or her ports of discharge in *England*,
“with liberty to touch at *Ireland*, and any ports in the *Channel*.” There were also counts for money had and received and money paid. The defendant pleaded the general issue, *non assumpsit*. The cause was tried at the sittings after last *Easter* term at *Guildhall, London*, before *Buller, J.* when the jury found a verdict for the plaintiff, damages 97 *l.* 18 *s.* subject to the opinion of the court, on the following case; that the defendant on the 1st day of *March* 1786 had under-written a policy of *Insurance* for 50 *l.* at a premium of five guineas *per cent.* upon the same ship, on the interest and for the account and use of the plaintiff, “at
“and

“and from *Torquay* to the banks of *Newfoundland*, and to any
 “and all port or ports in *Newfoundland*, and during her stay there,
 “and in port, or at sea, and banking, coasting, and fishing on
 “the banks and shore, until the 20th of *October* 1786 inclusive.”
 That afterwards (*viz.*) on the 24th of *October* 1786, the policy
 of *Insurance* in question was tendered to Mr. *James Allen*, and
 two other underwriters with the words, “on the banks or from
 “any ports in *Newfoundland* to *Falmouth*, or her ports of dis-
 “charge in *England*, with liberty to touch at *Ireland*, and in any
 “ports in the *Channel*,” which policy, so worded, the said *James*
Allen and the said two other under-writers declined to under-
 write; whereupon the broker who effected the same struck out the
 words, “On the banks or,” and then they underwrote the same;
 and afterwards on the same day the policy stated in the decla-
 ration with the words struck out as aforesaid was tendered to the
 defendant who under-wrote the same for 100*l.* at a premium of
 two guineas *per cent.* It was agreed that this insurance was to
 take up the ship from the 20th *October*. That on the 1st of
October 1786 the ship left a port in *Newfoundland*, and went
 to the Banks, fish’d there till the 7th *October*, and sailed from
 thence on that day to *England*, and of course never did fish or re-
 main upon the Banks after the 20th *October* 1786. That the
 vessel was lost on the 30th *November* following in the course of
 her voyage homewards.

Baldwin, for the plaintiff, argued that upon the construction of
 the policy it was by no means necessary that the ship should be in
 any port in *Newfoundland* on the 20th *October*, the day on which
 the policy was to attach; because if she had performed any part
 of her voyage, that was so much in favour of the defendant. It
 was a mere description of the time when the policy was
 to attach. In order to get at the meaning of the parties, it is
 necessary to consider the reason why the wording of the policy
 was altered. It was, because the underwriters would not insure
 the vessel during the time that she was fishing upon the banks;
 they would only insure the voyage homewards; therefore though
 the risk of the assured began from the 7th, yet as the risk of the
 underwriters was not to commence till the 20th, it could make
 no difference to them; and in fact their risk was considerably
 lessened, as she was part of her way homewards before the policy
 could attach.

Mingay, contra, was stopped by the court.

ASHHURST,

1787.

WAY
 against
 MODIGLI-
 ANI.

1787.

WAY
against
MODIGLI-
ANI.

ASHHURST, J.—This question is very clear. One of two things must necessarily be the case. Either the policy never attached at all, because the ship did not sail upon the voyage insured; or if she did, there was afterwards a deviation by her going to the Banks to fish, instead of proceeding homewards, according to the terms of the policy. It is immaterial which was the case; for either way the defendant is discharged.

BULLER, J.—The first is the substantial ground, namely, that the policy never attached at all. Where a policy is made in such terms as the present to insure a vessel from one port to another, it certainly is not necessary that she should be in port at the time when it attaches, but then she must have sailed *on the voyage insured*, and not on any other. Now what is the case here: The voyage insured is from a port in *Newfoundland to England*, whereas this vessel sailed *to the Banks* which was a different voyage. This point has been already decided by the case of *Wooldridge and Boydell (a)*, where it was held that if a ship, insured for one voyage, sail upon another, although in the same track part of the way, and she be taken before the dividing point of the two voyages, the policy is discharged. That was a stronger case than the present, for there the very intention of sailing upon a different voyage than that insured vacated the policy. Here she actually went and fished upon the Banks after she sailed from port.

GROSE, J.—The object of the underwriter's striking out the words mentioned was to avoid this very risk of fishing upon the Banks. It certainly is material whether a ship sails immediately from her port, as she has there an opportunity of making every necessary preparation for the voyage.

Postea to the Defendant.

(a) Dougl. 16.

Tuesday,
June 19th.

If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as

it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed.

&c.

FLETCHER against DYCHE

ASSUMPSIT for work and labour, for goods sold and delivered, money paid, &c. Pleas *non assumpsit*; 2dly. Set-off for moneypaid, and had and received; 3dly. A plea of set-off as follows; That heretofore, to wit, on the 27th day of June 1785, to wit, at &c. the defendant by a certain writing obligatory sealed

&c., became held and firmly bound to the defendant in the sum of 236*l.* to be paid to the defendant, when he the plaintiff should be thereto afterwards requested, with and under a certain condition thereto subscribed and underwritten, reciting that the defendant had contracted and agreed with the committee chosen for the ordering, appointing, and directing of the repairs of the parish church of *St. Mary le Bow, London*, for repairing of the said parish church, according to a certain particular or plan thereof given; and reciting, that one *John Dowley*, therein called the above bounden *John Dowley*, but who never executed the said writing obligatory, and the plaintiff had contracted and agreed with the defendant, that they would do, perform, and execute, all the smiths and ironmongers work, to be done and performed in and about the repairs of the said parish church, and which were mentioned and expressed in the said particular, plan, or estimate, and in the manner therein directed to be done, and find and provide all the materials for the doing thereof within the time or space of six weeks from the day of the date of the said writing obligatory, at and for the price or sum of 118*l.* 18*s.* which was agreed to be paid in three months after the said parish church should be completely repaired; and had agreed that if they should not have done and performed the said smiths and ironmongers work within the time therein before mentioned to have been agreed upon and limited for the doing thereof, they would forfeit and pay to the defendant the sum of 10*l.* for every week after the expiration of the time agreed upon and limited for the doing thereof, until the said smiths and ironmongers work should be completely finished; the condition therefore of the said writing obligatory was that they the said *John Dowley* and the plaintiff should within the time or space of six weeks perform in a good and workmanlike manner, according to the said plan, all the smiths and ironmongers work, &c. and should find and provide the materials, &c. and should keep indemnified the defendant, his executors, &c.; and that if they the said *John Dowley* and the plaintiff should make default, or should neglect to do the said smiths and ironmongers work within the time limited, they should well and truly pay to the defendant, his executors, &c. the sum of 10*l.* for every week from the time the said smiths and ironmongers work ought to be done, being six weeks from the day of the date of the said writing obligatory, as therein above mentioned, until the same should be completely finished. And the

1787.

FLETCHER
against
DYCHE.

1787.

FLETCHER
against
DYCHE.

defendant in fact saith, that the said *John Dow'ey* and the plaintiff did not, nor did either of them, within the said time or space of six weeks from the day of the date of the said writing obligatory, do, perform, or execute, or cause, &c. all the smiths and ironmongers work, &c. but neglected and omitted so to do, and therein failed and made default, and on the contrary thereof suffered and permitted the said smiths and ironmongers work to be and remain unfinished for the space of four weeks next after the expiration of the time agreed upon and limited for the doing thereof as aforesaid; whereby, and by force of the said writing obligatory and condition, the plaintiff became liable to pay to the defendant the sum of 40*l.* being at and after the rate of 10*l.* for each and every week of the said four weeks, after the expiration of the time so agreed upon and limited for the doing of the said smiths and ironmongers work, during which the same so remained unfinished as aforesaid, and the said sum of 40*l.* and every part thereof at the time of the commencement of this suit was and still is really and justly due and owing from the plaintiff to the defendant upon and by virtue of the said writing obligatory, and the condition thereof; and which said sum of 40*l.* so due and owing from the plaintiff to the defendant exceeds the damages sustained by the plaintiff, by reason of the not performing of the said several promises and undertaking in the said declaration mentioned, and out of which said sum of 40*l.* he the defendant is ready and willing and hereby offers to set off and allow the amount of the damages sustained by the plaintiff, according to the form of the statute, &c. and this the defendant is ready to verify, wherefore, &c.

To this third plea there was a general demurrer, and joinder in demurrer.

Law, in support of the demurrer, contended that the third plea setting off the four penalties, at the rate of 10*l.* for four weeks after the expiration of the time limited for doing the smiths and ironmongers work, could not be supported, First, because it attempts to set off a penalty instead of the money justly due. If this set-off can be allowed at all, it must be under the 8 *Geo. 2. c. 24. s. 5*. But that statute does not extend to this case; for that only allows the debt really and justly due to be set off. So that a penalty can not be set off at all: Now this is strictly a penalty; the words creating the penalty are "that the plaintiff shall forfeit and pay 10*l.* weekly, &c." And it cannot be

be considered as a mere compensation to the defendant for non-performance of the work within the time limited; for it does not appear that the defendant was himself under any limitation in point of time as to the performance of his contract with the commissioners. It is likewise excessive, because it bears no proportion to the whole sum to be paid for the work done. And there are no other limits to the penalty than the penalty of the bond itself. If it be contended by the defendant's counsel, that this is in the nature of a liquidated satisfaction, it is to be observed that this is not like any of those cases which have been determined on that ground. In the case of *Rolfe v. Petersen* (a), where the lessee covenanted to pay an increased rent for ploughing up meadow ground, it was considered not as a penalty but as a liquidated satisfaction: for it was only an agreement to pay a larger sum for using the land in a particular way. But the present case is that of a strict penalty, in consequence of not performing an agreement, for which there does not appear to be any equivalent to the party. There are several cases where penalties have been considered in the nature of liquidated damages, but those are cases where the penalties have barely exceeded the sums really due, and they have been allowed to save the parties expence. Such was the case of *Tall v. Ryland*, 1 Ch. Cas. 183. In *Redriffe v. Hogan* (b), it was determined that a penalty cannot be set off. If an action had been brought on this bond, it would have been competent to the jury to have given less damages than the amount of these penalties. Before the stat. 8 & 9 W. 3. the jury might have given less damages than the penalty. 2 Ro. Abr. 703. pl. 9. (c). 1 Lev. 111. And since the statute they ought to give the damages really sustained by the non-performance of the work. Here the party might be put in as good a plight as if the condition of the bond had been performed: This rule was laid down by Lord Somers (d), that in such a case a court of Equity would relieve; therefore the defendant should have averred that the damages really incurred by the non-performance of the agreement amounted to the sum which he intended to set off. This is not like the case of demurrage, which is a stipulated rate of hire, and not a forfeiture; for there the owner of the ship loses the use of her during the whole time she is detained, and the other party has the use of her the whole time.

1787.

FLETCHER
against
DYCHE.

(a) 6 Bro. Parl. Cas. 470.

(b) 2 Burr. 1024.

(c) Vid. 4 Burr. 2229. 2231.

(d) Prec. in Chan. 487.

But

1787.

FLETCHER
against
DYCHE.

But secondly, This cannot be set off, because there is no strict mutuality. It sets off money, which, by the condition of the bond, was to become due from the plaintiff and another, and not from the plaintiff alone, by virtue of an antecedent agreement between the three. And though this bond was only executed by the plaintiff, yet the defendant is estopped from saying that this debt is not due from the plaintiff and another; he cannot dispute their joint liability. Besides the breach assigned is not warranted by the condition. The bond is conditioned for the performance of certain work in a limited time by two, or payment by two of 10*l.* per week. The breach should have been assigned, that the two had neither done the work, or paid the money, whereby the penalty became forfeited. Whereas it is assigned that the two had not done the work &c, whereby the one became liable to pay the 10*l.* per week: But no such liability was created by the bond itself.

The other side was stopped by the court.

ASHHURST, J.—These sums set off are in the nature of liquidated damages, and are such a kind of penalty, if they may be called by that name, as a court of equity would not relieve against. The object of the parties in naming this weekly sum was to prevent any altercation with respect to the *quantum* of damages which the defendant might sustain by reason of the non-performance of the contract. It would have been difficult for the jury to have ascertained what damages the defendant had really suffered by the breach of the agreement; and therefore it was proper for the contracting parties to ascertain it by their agreement. So that this is a case of stipulated damages, and it is not to be considered as a penalty. If so, and the parties have entered into a joint and several bond, it becomes the separate debt of both, and therefore may be set off against either. Then it has been objected, that there is no mutuality in the debts; because, first, it is a joint debt; and secondly, that the plaintiff should have a compensation from the other party: As to the first, it is sufficient to say, that this is a *separate* as well as a *joint* debt, and therefore may be set off. And as to the other ground of objection, it is not necessary to determine that question in this case; but if it were, I think he might have compensation in another form, by bringing an action for money paid, laid out, and expended to his use. But that is not material as between these parties.

BULLER, J.—

BULLER, J.—The principal question to be considered is, whether this is in the nature of liquidated damages or a penalty. When there is a penalty in the bond, it is strange that the sum mentioned in the condition should be called a penalty. I do not know how there can be an equitable and a legal penalty. But this is as strongly a case of liquidated damages as can possibly exist, and is like the case of demurrage. In either case it is impossible to ascertain precisely what damages the party has really sustained; and therefore the contracting parties agree to pay a stipulated sum. Then it was contended that the defendant might have recovered less damages than the amount of this stipulated sum before a jury: but that is not so. In the case of *Lowe v. Peers* (a,) where a stipulated sum was claimed for breach of a marriage contract, Lord Mansfield said, "Where the precise sum is fixed and agreed upon between the parties, that very sum is the ascertained damage, and the jury are confined to it." As to the case in *Lev.* that was determined on the ground of its being a catching bargain. The plaintiff's counsel then objected to this set-off because there was no mutuality; but that depends on the question, whether the debt is due from the plaintiff and another person or from the plaintiff alone. If the former, the debt cannot be set off: but it appears that the bond was executed by the plaintiff alone. No debt can arise upon the bond from the other party who did not execute. The plaintiff therefore alone can be sued upon the bond; so that there is a mutuality.

GROSE, J.—was of the same opinion.

But the court afterwards gave the plaintiff leave to amend on payment of costs.

(a) 4 Burr. 2225.

The KING against the Inhabitants of CHERTSEY.

Wednesday,
June 20th.

TWO justices by an order removed the pauper *Jane Rilly* from *Thorpe to Chertsey*, both in the county of *Surry*. This order, being appealed against to the sessions, was confirmed, subject to the opinion of this court on the following case;

The pauper was hired for a year at the wages of 4*l.* and served out that year with Mr. *Shinley* in the parish of *Chertsey*. About three weeks before that service expired, her father, who

An agreement by a daughter to live with her father, and to do the offices of a servant for a year, for her board and lodging and other perquisites

is a good hiring for a year, though the daughter is to be at liberty to earn what she can by her labour; and a service under it will be sufficient to gain a settlement.

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1787.

FLETCHER
against
DYCHE.

1787.

The KING
against
The Inhabi-
tants of
CHERTSEY.

was a day labourer, in consequence of his wife's death came to the pauper and applied to her to come and live with him to do the offices of a servant for a year in the parish of *Tborpe*, and offered her her board and lodging, and such profits as she could make by keeping fowls, and what she could earn by her own labour; and if that did not produce as much as she got at Mr. *Shirley's*, her father was to make up the difference. She agreed to come on those terms, and came accordingly; and lived with him in pursuance of that agreement in the parish of *Tborpe* for a year and upwards, during which time she got about one guinea and an half by keeping fowls, and two guineas and an half by going out charring, and taking in plain work; and at the end of the year her father gave her ten shillings, as an additional recompence for her having gone out with him to reap in the harvest month.

Silvester and Shepherd, in suport of the order of sessions, admitted that a father might hire a child as a yearly servant so as to enable the child by the service to gain a settlement, but contended that in the present case there was not a sufficient hiring of and service by the pauper in the parish of *Tborpe*. It appears in the special case that the pauper's father on his wife's death applied to the pauper to come and live with him, but she was not hired to supply the place of any other servant; and it appears from the facts stated that the daughter was not under the control of her father as a servant, for she was expressly permitted to earn what she could by her own labour by serving whom she pleased. The pauper therefore could not possibly be considered as the servant of the father within any of the adjudged cases upon this subject, for she was not under the command and control of her master during the whole year; the contract was not binding, for as she was at liberty to work for whom she pleased, the father was not entitled to her earnings, nor could he compel her to perform his work. Now if the pauper were not hired as a servant, her living with and serving her father will not give her a settlement in *Tborpe*. This point was determined between the parishes of *Gregory Stoke v. Pittminster* (a). If the case between the parishes of *Jessop and Missenden* (b) be cited on the other side, it is to be observed that that case only determined that where there was a hiring, the circumstance of its being a

(a) *Bott.* 289.(b) *Fol.* 142.

hiring by a father could make no difference: There the hiring was stated as a fact; but here no such fact appears.

Palmer, contra, was stopped by the court.

ASHHURST, J.—All that is necessary to give a settlement under these statutes is that there should be a hiring for a year and a service for a year. As to the hiring for a year, it is only necessary to read the words of the case to determine it; it states that the pauper's father applied to her to come and live with him *to do the offices of a servant for a year* on certain terms, which she agreed to, and that she came accordingly and *lived with him in pursuance of that agreement for a year*. The objection is, that this is no hiring, because the sessions have not stated that the pauper lived as an hired servant; but there is no occasion for the sessions to state that expressly, if it sufficiently appear from the terms of the contract: Now in the present case that does appear. Then it was objected that the contract was not binding: but that is not so; she was hired to do all the offices of a servant for a year. The terms of the contract are not such as would enable the pauper absolutely to leave her father's service, but only to do particular work for her own benefit: She was first bound to perform all his work, and consistently with that she was at liberty to gain as much as she could earn by her own labour. This therefore was a good hiring for a year. And as to the service, the case states that the pauper lived with her father in pursuance of the agreement for a year. This is by no means like the *Pittminster* case; for there there was no hiring at all for any time.

(a) GROSE, J.—In order to gain a settlement by hiring and service, there must undoubtedly be a hiring for a year and a service for a year. But in the hiring it is not necessary to use technical terms; the word "hiring" need not be stated on the case; it is sufficient if it appear that the servant agreed to serve and the master to pay for that service for a year. Then the circumstance of the father being the master of his own child will not vary the case. This was not a hiring generally by the father as long as he lived, but a hiring for a year expressly. The father offered the pauper certain terms, which it is stated she agreed to accept; then there was a contract between them for the hiring. According to the terms of this contract, she was not at liberty to desert her father's service; she was only per-

(a) BULLER, J. was sitting at *Guildhall* the whole of this day.

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1787.

The KING
against
The Inhabi-
tants of
CHERTSEY.

1787.

The KING
against
The Inhabi-
tants of
CHERTSEY.

mitted to do what other work she could consistently with her father's service; which she was first bound to perform. She did every thing which related to her father's service; and her earning besides that will not prevent it's being considered as a hiring for a year. And as to the service, it is expressly stated that the pauper lived with her father for a year *in pursuance of that agreement*. Therefore the rule must be made absolute for

Quashing both the orders.

PAGE *against* DIVINE and Others.

Wednesday,
June 20th.

The party
who is to give
oyer of a
deed is al-
lowed two
days for that
purpose ex-
clusive of the
day on which
it is demand-
ed.

ON a rule to shew cause why the interlocutory judgment should not be set aside for irregularity, it appeared that this was an action of trespass, to which the defendant pleaded a justification on a deed, which he set out; that on *Friday* evening the plaintiff demanded oyer and a copy of that deed, which not being complied with on the *Monday* following he signed judgment; and the only question was what time the defendant was allowed to give oyer in.

Morgan, in support of the rule.—*Garrow*, against it.

ASHHURST, J.—The defendant has two days in which to give oyer and a copy of the deed, which are *both reckoned exclusive*. And the party, of whom oyer is demanded, must carry it to the opposite party. In the present case the judgment was signed before the expiration of the two days; and therefore it is irregular.

Rule absolute.

Wednesday,
June 20th.

No proceed-
ings having
been had for
above a year,
the plaintiff
two days be-
fore *Hilary*
term gave
notice of his
intention to
proceed, two
days after the
term he
served a rule to plead, and the same vacation judgment was signed for want of a plea, which was held to be regular.

MILBOURNE *against* NIXON and Others.

NO proceedings having been had in this cause for above a year, it became necessary for the plaintiff to give a term's notice of proceeding. Two days before *Hilary* term, the plaintiff gave notice of his intention to proceed; on the 14th *February*, two days after *Hilary* term, the rule to plead was served; and on the 18th *April*, in the course of the same vacation, the plaintiff signed judgment for want of a plea; which

was held to be regular.

Lawndes moved to set aside for irregularity, contending that the rule of the court, which requires a term's notice to be given before the plaintiff can proceed, comprehends the term and the vacation. That the defendant had the four first days of *Easter* term to plead. That no rule to plead could be given in the vacation. And that even if the vacation as well as the term were not meant to be included by the rule, the judgment had been signed too soon, for it appears to be signed as of *Hilary* term, so that there was not even a term's notice.

Chambre, contra, insisted that, according to the practice of the court, the judgment was regular, for that the rule did not extend beyond the term. And though the judgment appeared to be signed as of *Hilary* term, the defendant had had in fact the benefit of the rule for a whole term. And

The Court (after consulting the Master) were of that opinion; adding that the judgment would appear to be regular on the record, though signed as of *Hilary* term. For the rule, requiring a term's notice when no proceedings have been had in the cause, was only a rule of court introduced for the benefit of the party, the full benefit of which the defendant had had in this instance.

Rule discharged (a).

(a) *Vid. Salk. 457. 645. 6 Mod. 18.*

THE KING *against* The Inhabitants of MIDDLEZOY.

THE paupers *H. Musgrave*, *S.* his wife, and *C.* their child, were removed by an order of two justices from the parish of *Middlezoy, Somerset*, to the parish of *Sydbury, Devon*. On appeal to the sessions that order was quashed, subject to the opinion of this court on the following case.

The appellants having proved a hiring and service of the pauper for a year, in the parish of *Middlezoy*, the respondents proposed to shew that a settlement could not be gained thereby, by reason of subsisting indentures of the pauper's apprenticeship to one *Thomas Warren* of *Sydbury* at the time of such hiring and service: they had given a notice to the appellants of the substance and to the effect following, (*viz.*) to produce at the trial of the appeal, a certain indenture of apprenticeship, bearing date on or about

jection, if enough appears to enable them to decide according to the merits of the case.

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1787.

MILBOURNE
against
NIXON.

Saturday,
June 23d.

A deed, coming out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, and must be received in evidence without proof of the execution. The court will not send a case down to the sessions to be restated on a mere formal objection.

1787.

The KING
against
The Inhabi-
tants of
MIDDLESEX.

the 10th day of *January*, 1784, whereby *Henry Musgrave*, (the pauper) was put and placed apprentice to *Thomas Warren*; and an indenture to that purport was accordingly produced in court by the appellants, with proper seals and signatures, but no subscribing witness thereto; and no evidence was adduced by the respondents to prove the sealing and delivery thereof; whereupon it was contended on the part of the appellants that the same could not be given in evidence without proving the execution thereof; to which it was answered that, coming from the hands of the appellants, it ought to be received in evidence against the party producing it without proof of the execution. The court, being of opinion that proof ought to be given of the due execution of the said indenture, refused to admit the same in evidence without such proof. The respondents then produced the counterpart of the said supposed indenture, which they proved to be duly executed, and tendered the same in evidence; but the court also refused to admit the said counterpart. The pauper served the said *Thomas Warren* in the parish of *Sydbury*, for more than two years subsequent to the date of the said supposed indentures of apprenticeship, and afterwards before the term thereof expired, without any consent of the said *Thomas Warren*, served for a year as aforesaid, in the parish of *Middlesex*, under a hiring to one *Samuel Wilcox*.

Rooke, Serjeant, and *Watson*, in support of the order of sessions, observed that the case was defectively stated; the fact being that the pauper was bound apprentice to *Warren* at the time he resided in another parish, and before he became an inhabitant of *Sydbury*. If that fact had been stated, the production of the indentures of apprenticeship would not have concluded the appellants. But even if this case be not sent down to be restated the rule must be discharged, for it is not stated as a fact that the pauper was an apprentice at the time he hired himself to *Warren*.

The counsel on the other side were stopped by the court.

ASHHURST, J.—The sessions have done wrong in refusing to admit this evidence; because as the indentures of apprenticeship came out of the hands of the appellants, they were concluded from saying they were not properly executed. Therefore the indentures ought to have been received; and consequently the order of sessions must be quashed.

BULLER, J.—The only question, as a general one, in this case is, whether the indentures of apprenticeship should have been received

1787.

The King
against
The Inhabi-
tants of
MIDDLESEX.

received in evidence. I do not go the whole length of saying that the production of them by the appellants was conclusive against them, but undoubtedly they ought to have been received. In civil actions where a plaintiff wishes to give in evidence a deed in the defendant's custody, he gives the defendant notice to produce it; and the deed, when produced, must *prima facie* be taken to be duly executed; because the plaintiff, not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution of the deed. Therefore an instrument, coming out of the hands of the opposite party, must be taken to be proved. If indeed there be any fraud in the case, the other party will not be precluded from impeaching it. But in this particular case it appears that if the appellants had not produced the indentures at all, the counterpart must have been admitted in evidence, which would have been sufficient.

The next question is, whether this case should be sent down to the sessions to be re-stated. Now, strictly speaking, the justices at the sessions ought to find facts, and not the evidence of those facts. But we all know that of late years this court has not been very astute in finding out trivial objections in the manner of stating sessions cases, where enough appears to warrant the court to decide according to the justice of the case. Now here there cannot be any doubt what the merits of this case are, and what would have been the effect of the indentures, if they had been received in evidence; it must have appeared as a fact by a reference to the dates that at the time of the hiring and service the pauper was an apprentice.

GROSE, J.—This evidence should undoubtedly have been received, though it might not be conclusive: as if it had been impeached on the ground of fraud; but still it was good evidence. If the indentures had not been produced, the counterpart would have been sufficient evidence. Then the question is whether we should send this case back again to the sessions, at the request of the parties who made this sort of objection. It seems to me that the objection was frivolous at the sessions; and the doubt, if any, was removed by the offer of the respondents to prove the counterpart. On strict grounds of law the sessions have done wrong; and according to the substantial justice of the case we ought not to send it down to be re-stated.

Gibbs, who was to have argued in support of the rule, then mentioned the following cases in which the same point had been determined. *Thompson v. Jones*, M. 18 Geo. 3. B. R. On a motion

1787.

The KING
against
The Inhabi-
tants of
MIDDLESEX.

a motion for a new trial it appeared that at the trial of this cause at the Summer *Salisbury* assizes 1777, the defendant had called on the plaintiff to produce a lease in his possession, which he had given no notice to produce. The plaintiff produced the lease, and insisted on the defendant's proving the execution of it before he gave it in evidence, which *Perryn, B.* who tried the cause, held to be necessary; and therefore he would not suffer the defendant who could not prove the execution of it to read it. Lord *Mansfield* said, that, from the judge's report, the lease appeared to be totally immaterial; but said, that if it had been material, he should have permitted it to be read, though the execution was not proved, as it came out of the plaintiff's hands. The other case was *Passel v. Godfall*, Sit. after M. 1782, cor. Lord *Mansfield*. The plaintiff had given the defendant notice to produce an agreement at the trial; and on the defendant's producing it, his counsel objected to it's being read in evidence till the plaintiff proved the execution, But Lord *Mansfield* over-ruled the objection, saying that the defendant produced it as the original agreement, and therefore the plaintiff need not prove it.

Per Curiam.

Order of sessions quashed.

Thursday,
June 23d.

LANE and Others against BACCHUS.

The court will not set aside an execution sued out before, but executed after, the allowance of a writ of error served on the sheriff and the party, if the plaintiff in error has not regularly put in bail.

RULE to shew cause why the writ of *fiery facias* issued and executed in this cause by the sheriff of *Bucks*, should not be set aside for irregularity; and why the goods levied, or the money arising from the sale thereof, should not be restored to the defendant. Judgment was signed on the 30th of *April*; the plaintiff then sued out a writ of *fiery facias*: Afterwards the writ of error was allowed and served on the agent in town on the 3d *May*, and was served on the plaintiff's attorney in the country, and on the under-sheriff, on the 5th *May*; the sheriff entered on the same day, but after he received notice of the allowance of the writ of error. No bail in error was put in. And the only question was, whether the allowance of a writ of error was or was not a stay of execution, no bail having been put in.

Erskine and *Lambe* in support of the rule. *Le Blanc*, Serjeant, contra.

ASHHURST, J.—The question is, whether this execution regularly sued out at the time, and sent into the country, was

superfeded by the allowance of the writ of error. If the writ of error had been followed up immediately by the plaintiff in error regularly putting in bail, it would have operated as a supersedeas. The party taking out execution after the allowance of a writ of error, and before bail put in, does it at his peril; for if the writ of error be regularly followed up, the execution will be set aside. But in the present case, no bail having been put in, the writ of error became an absolute nullity. Therefore there is no foundation for the application, and the

Rule must be discharged.

WINTER and Others Assignees of BEYER *against*
KRETCHMAN.

Saturday
June 23d.

THIS was a *scire facias* to revive a judgment by the assignees of a bankrupt. The declaration, after stating a judgment recovered by the bankrupt against the defendant in the court of Common Pleas, and an affirmance of it in this court on a writ of error, stated that "after the giving of the said judgment, and also after causing the said record thereof to be brought before this court as aforesaid, the said J. Beyer became a bankrupt within the true intent and meaning of the statutes made and now in force concerning bankrupts, and that all and singular the goods, debts, and effects, of the said bankrupt, at the time of his becoming a bankrupt, were after he became a bankrupt in due manner assigned to the plaintiffs, according to the form of the statute in that case made and provided." It then proceeded in the usual form.

A declaration in a *scire facias* by the assignees of a bankrupt, stating "that he became a bankrupt within the meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain, without alleging that the party was declared a bankrupt, or that his effects were assigned by deed.

To this there was a special demurrer, which assigned the following causes; that it does not appear in or by the said declaration that any commission of bankrupt was ever awarded or issued against the said J. Beyer; or that, at the time of awarding and issuing the same, he the said J. Beyer was a trader or in any wise indebted to any person or persons whomsoever; or that he had committed any act of bankruptcy so as to be liable to become or be made a bankrupt within the true intent and meaning of the several statutes concerning bankrupts; and also for that it does not appear in or by the said declaration by whom or in what manner the goods, debts, and effects, of the said J. Beyer, at the time of his supposed bankruptcy, were assigned to the said

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plaintiffs,

1787.

WINTER
against
KRETCHE-
MAN.

plaintiffs, or that the same were assigned to them by deed; nor have the said plaintiffs in or by their said declaration made any profert of the deed of assignment to them the said plaintiffs of the goods, debts, and effects aforesaid, &c. And joinder in demurrer.

Shepherd, in support of the demurrer, observed, that he understood this case was not to have been argued this term, and therefore was not sufficiently prepared. But as the court intimated to him that it appeared to them that the party had demurred merely for the purpose of delay, and that it ought not to stand over for argument till *Michaelmas* term, he suggested to the court that this might be compared to the case of an executor, who in an action only states himself simply to be an executor; but in a *scire facias* by him he must state particularly the debt, the will, and the probate. So here perhaps this might be sufficient in an action; but in a *scire facias* by assignees it was necessary to allege specially that the bankrupt was duly declared a bankrupt, and that his effects were regularly assigned by deed to the assignees.

Burrough, *contra*, was stopped by the court.

ASHHURST, J.—I cannot distinguish between a *scire facias* and an action brought by the assignees of a bankrupt. There is no reason why it should be necessary to state a title more particularly in the one than in the other. In an action an executor or an administrator states himself generally to be such in the beginning of the declaration: but, as from the difference of forms he cannot allege that in the beginning of the declaration in a *scire facias*, he is allowed to state it as generally as possible in a subsequent part.

BULLER, J.—It has been held in a variety of cases, that a *scire facias* is an action^(a). As to the case of executors, the declarations in a *scire facias* and an action are in substance the same. It appears in both that an executor sues as such. Besides an executor sues in a different form from an assignee; the executor can only sue in the *detinet*, though his testator might have sued in the *debet* and *detinet*; but assignees of a bankrupt are allowed to sue both in the *debet* and *detinet*, because the whole property of the bankrupt is vested in them by law.

Per Curiam.

Judgment for the plaintiffs.

(a) Vide the cases referred to in 1 Vol. 268.

1787.

Saturday,
June 23d.The KING *against* SHARPNESS †.

PALMER shewed cause against a rule which had been obtained by *Garrow* to discharge the defendant out of custody as to an attachment for non-payment of costs, the term of imprisonment for his offence being expired. The circumstances were that the prosecutor, Mr. *Pembroke*, being a justice of the peace, had indicted the defendant, who was the keeper of the gaol at St. *Albans*, for suffering a prisoner to escape, who had been committed by him (the prosecutor) for felony; upon which indictment the defendant had been convicted. He contended that the prosecutor was entitled to his costs under 5 & 6 *W. & M. c. 11. s. 3.* as being a public officer prosecuting for the benefit of the public. And he cited *R. v. Smith (a)*, where Lord *Mansfield* said that it was enough if the prosecutor was proved to be a civil officer in order to entitle him to his costs.

A justice of peace, who has prosecuted a gaoler to conviction for suffering a prisoner to escape committed by him on a charge of felony, is not entitled to the costs of the conviction under the 5th & 6th *W. & M. c. 11. s. 3.*

Garrow, in support of the rule, said that the prosecutor had not prosecuted *ex officio*, and therefore did not come within the rule. That as a magistrate he had done his duty when he had committed the felon, and there his jurisdiction had ceased. As for the offence of letting him escape, it was no more the duty of the prosecutor than of any other individual to indict the defendant for it. *R. v. Ingleton. 1 Wils. 139.*

ASHHURST, J.—On looking into this act of parliament it appears to me that the defendant ought not to be charged with costs. This is not one of those instances mentioned in the third section of the act, which only extends to those officers who prosecute or present *ex officio*, or where the prosecution is carried on by the party grieved. If a justice of the peace were to present a road, and that presentment were afterwards turned into an indictment, there the justice would be entitled to costs; or if a justice were to indict a constable or other inferior officer for disobeying his order, in such case also he would be entitled to his costs. But this is not a prosecution carried on by the prosecutor as a magistrate, for any other person might have indicted the defendant: The offence in this case was such as concerned the general justice of the realm.

BULLER, J.—From a review of all the cases in a MS. notebook it appears that the prosecutor is not entitled to his costs.

† *Ante*, 1 Vol. 228.(a) 1 *Burr.* 54.

This

1787.

The KING
against
SHARPNESS.

This book does not indeed include a case from *Basingstoke* which came before this court a few years ago; but there I understand that the prosecution was carried on by the clerk of the peace, whose duty it was to draw up all presentments of constables in the form of indictments; and it was there determined that the prosecutor was entitled to costs. But here I cannot say that it was the duty of the prosecutor as a justice of the peace to prosecute this defendant. The case originally came before him in the character of a magistrate on the complaint of some other person; and if the justice chose to take the prosecution out of private hands, and to conduct it himself, he cannot be said to prosecute as a magistrate, but like any other individual. The court has always construed this act of parliament as strictly as possible. There was one case indeed on this statute, the law of which I doubt, where it was held that a person who was injured and was really the prosecutrix was not entitled to costs, because her name did not appear on the back of the indictment, though it was well known she was the real prosecutrix (a); but I believe that case has been since over-ruled. Another case afterwards came before this court, where the question was, whether the prosecutor was entitled to the costs of a trial at bar; and it was determined that he was not, because the statute only extended to small offences (b). These cases shew that the court has always put a strict construction on this act of parliament.

Rule absolute.

(a) *Rex v. Gorer*, M. 16 G. 3. the prosecutrix was Lady Gorer, who indicted the defendant for a public nuisance.

(b) This appears from some MSS. notes of Sir Simon Harcourt, when he was Master of the Crown Office; and which was the same book that Mr. Justice Butler referred to.

Tuesday,
June 25th.

The KING against the INHABITANTS of KNIGHTON.

In order to gain a settlement by taking a tenement of 10l. per annum, the occupier must reside in the parish where part of the premises lies.

TWO justices by an order removed the pauper Robert Hardy, and his three children, from *Knighton* to *St. Margaret's* in *Leicester*; The sessions on appeal discharged that order, subject to the opinion of the court of King's Bench on the following case.

The pauper, Robert Hardy, being settled in the parish of *St. Margaret*, took a windmill in that parish of the yearly value of ten guineas at *Lady-day* 1778, and occupied it for one year. On the 30th of *April* following he married *Ann*, the daughter of

Samuel

Samuel Ward of *Knighton*, which is a township within the parish of *St. Margaret*, but distinct as to the maintenance and settlements of the poor, and has distinct officers. Before the pauper's marriage his father-in-law said, he would give him house room till he could provide himself; and on his marriage he went accordingly to reside with his father-in-law in *Knighton*, whose house was about a quarter of a mile distant from the said mill, and continued so to reside till the death of his father-in-law in 1786. During the time he occupied the said mill, or afterwards, he neither rented nor occupied any land or tenement in *Knighton*. During the last half-year of the time he rented the said mill, he kept a man servant, who resided with him in his father-in-law's house as part of his (the pauper's) family. The pauper believed it was known to the township of *Knighton* that he rented the mill, because he served some of the inhabitants there with grits, and they knew him to be a miller.

1787.

The King
against
The Inhabitants of
KNIGHTON.

Bearcroft and *Dayrell*, in support of the order of sessions, contended that if a man were in a capacity to gain a settlement, namely, if he were in any one of those situations in which the positive laws of the country conclude that he is not likely to become chargeable, he is irremovable from the place in which he happens to reside; and that wherever a person is irremovable for forty days on account of his renting a tenement of 10*l.* per annum, he thereby gains a settlement. Now, in the present case, the pauper was trusted with a tenement of 10*l.* per annum, and therefore was not likely to become chargeable. The ability of the pauper to rent a tenement of the yearly value of 10*l.* is the criterion by which these cases are to be decided. In the case of the King v. the Inhabitants of *Sandwich* (a), Mr. J. *Page* said, "a man who is able to rent and does rent 10*l.* a year shall be settled in the parish where he lives." *Probyn*, J. said, "where a person, living in one parish, rents an entire tenement of above 10*l.* a year in that or in any other parish, it gains him a settlement in the parish where he lives." And Mr. J. *Lee* said, "the reason of the cases upon this head has constantly gone upon the sufficiency of a person able to rent a tenement of such a value." In the King v. the Inhabitants of *Fillongley* (b), it was considered that a person who occupied a tenement of 10*l.* per annum, although he paid no rent for the greatest part of it,

(a) Burr. S. C. 44.

(b) 1 Vol. 458.

1787.

The King
against
The Inhabi-
tants of
KNIGHTON.

was not likely to become chargeable to the parish, and therefore was not removeable under the 13 & 14 Car. 2. c. 12. So likewise in the case of *South Sidenham* and *Lamerton* (a), the court went on the credit and ability of the party to rent 10*l.* *per annum*, concluding that a person, who is entrusted with such a tenement, is not likely to become chargeable. If then a person who has sufficient credit to rent a tenement of such a value be not within the 13 & 14 C. 2. c. 12. it has been determined that residence upon the tenement is by no means necessary. The King v. the Inhabitants of *Batley*, Burr. S. C. 107.

Galley, contra, insisted that in order to gain a settlement under the 13 & 14 Car. 2. c. 12. by renting a tenement of the yearly value of 10*l.* it was necessary for the pauper to reside forty days in the parish in which part of the tenement was situate. This is not like a settlement by hiring and service, in which case the service gives the pauper a settlement wherever the last forty days service is performed. For the statute directs that those persons only shall not be removed who come to settle in any tenement &c. So that the legislature had in view a residence on the tenement. Now in this case so far from the pauper's coming to settle in *Knighton*, it is expressly stated that he only came to live there till he could provide himself; this was rather a permission to the pauper to reside with the father-in-law in *Knighton* till he could gain a settlement. There are several cases in which the court has considered residence in the parish where part of the tenement lies to be necessary in order to give the occupier a settlement. In the King v. *Llandverras* (b), Mr. J. Yates said, "there must be a residence of forty days in the parish in order to give the pauper a settlement." And *Aston, J.* said, "he need not reside on any part of the tenement he takes: It is enough if he reside in the parish." Mr. J. *Aston* likewise laid down the same doctrine in the case of the King v. *St. Giles* (c), where the question was, whether renting part of an house of the yearly value of 10*l.* was sufficient to give the occupier a settlement; and there he said, "to be sure the criterion is renting a tenement of the value of 10*l.* *per annum*; but the person must reside in the "parish" (d). And the case of the King v. *Topcroft* (e) is scarcely to be distinguished from the present. There the pauper in 1779 rented a farm at *Kempnall* for 30*l.* *per annum*, and lived therein till *Christmas* 1783, when he publicly went to and did reside

(a) *Iott.* 356. (b) *Burr.* S. C. 571. *Felt.* 358. (c) *Burr.* S. C. 800. (d) This was read from a MS. note. (e) *M.* 25 G. 3. B. R.

with

with his son-in-law in *Topcroft*. He carried with him all his stock and household furniture, and resided there for above forty days before he gave up the possession of his farm: but he never hired or occupied any tenement in *Topcroft*, and though Lord *Mansfield* there said, "even if it were sufficient to occupy a tenement of 10*l.* *per annum* in another parish, he has not done it there;" yet Mr. *J. Buller* said, "it is taken for granted in all the cases that the pauper has resided in part of the parish in which the tenement lies; and I think he must reside there." And this court adjudged that the pauper gained no settlement in *Topcroft*. Besides if it were sufficient, in order to gain a settlement, to rent a tenement in one parish and live in another, those cases, in which it was doubted whether the whole should lie in the same parish, could never have arisen; for if it were not thought necessary that *some part of the tenement* at least should be in the parish where the pauper resided, it never could have been doubted whether *the whole* must lie in such parish. And in the case of the King v. *Butley* though the pauper, who gained a settlement by renting the windmill, did not lie in it, yet he resided in the parish.

1787.

The KING
vs. The Inhabitants of
 KNIGHTON.

Cur. adv. vult.

And now *Ashburst, J.* delivered the opinion of the court. The question in this case is, whether the pauper gained a settlement in the parish where he rented a tenement of the yearly value of 10*l.* or in the parish where he resided, occupying at the same time a tenement in another parish. And we are all of opinion that he did not gain a settlement in *Knighton*; because in order to gain a settlement by renting 10*l. per annum*, there must be a residence either on the premises, or at least in the parish where some part of the premises lies. The case of the King v. *Topcroft* is decisive of the question; and there are two or three other cases (a) which confirm this doctrine, where it has been taken for granted that there must be a residence.

Order of sessions quashed.

(a) *R. v. Butley, Burr. 3. C. 109.*

AURIOL

Wednesday.
June 27th.

AURIOL and Another against THOMAS.

Where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expenses beyond the amount of 5*l.* per cent. if such charges are reasonable, warranted by usage, and not made a colour for usury. The charge of 10*s.* per pagoda on a bill returned protested from India is not excessive, though it was taken in payment here at the rate of 6*s.* and 6*d.* per pagoda.

ON a motion to set aside a writ of enquiry for excessive damages, it appeared that the plaintiffs were the indorsees of a bill of exchange drawn here by *G. Campbell* for 2800 star pagodas payable to the defendant or order, and directed to *G. Mowbray Esq.* at *Madras*: The plaintiffs discounted the bill, giving the then current price of the exchange, which was 6*l.* 6*s.* per pagoda. They sent it to *Madras*, from whence it was returned to *England*, protested for non-acceptance and also for non-payment; on which the plaintiffs had demanded and recovered at the rate of 10*s.* per pagoda, and 5*l.* per cent, from the expiration of thirty days after notice to the defendant of it being returned.

Wood shewed cause, and contended that this could not be considered as an usurious demand, because the usage as well as the particular agreement of the defendant had been proved before the jury to charge at the rate of 10*s.* per pagoda for bills returned from *India* protested, and 5*l.* per cent. after thirty days notice to the defendant of non-payment, which included all incidental charges.

Philips, in support of the rule, cited the case of *Benson v. Parry (a)*, where it had been held to be usury for country bankers to take more than 5*l.* per cent. on inland bills payable at another place. And if the practice be contrary to law, no usage could make it good.

(b) *BULLER, J.*—The case of *Benson v. Parry* at *Hereford* was determined on a mistake, but when it was more maturely considered by this court on a motion for a new trial, they were unanimously of opinion that extra charges might be allowed though they amounted to more than 5*l.* per cent., if they were fair and reasonable, and not as a colour for usury; and there a new trial was granted. This doctrine was again recognized in two *Nisi Prius* cases, the one before the Lord Chief Baron *Eyre*, on the circuit, the other before me at the sittings at *Westminster (c)*. So that it is now clearly settled that the party is enti-

(a) Summer Assizes at *Hereford*, 1780. (b) *Ashurst, J.*—was absent. (c) *Winch qui tam v. Fenn. Sitt. Ass. H.* 1786. B. R. That was an action for usury against the defendant, who was a country banker living at *Sudbury*. It appeared on the trial, that the practice was to discount bills in *London* for various correspondents at *Sudbury*, and for which they had 5*l.* per cent. for the time the bills had to run; and they had also 5*s.* per cent. on the gross sum without any reference to the time which the bill had to run; This commission had been taken by the defendant on the bills in question, and the jury found a verdict for the defendant under the judge's direction.

pled to take not only 5 l. per cent. for legal interest, but also a reasonable sum for remitting and other necessary incidental expences. The demand in the present case arises upon a bill of exchange payable in *India*, which, if not paid there when due, would carry the interest allowed in that country; and it is admitted that the constant course with respect to bills returned protested from *India* has been to allow at the rate of 10 s. per pagoda, which includes interest, exchange, and all other charges. There cannot therefore be any colour for saying that this transaction is usurious.

GROSE, J.—The same doctrine has been confirmed in the court of Common Pleas. And the line which has been taken is, that if the sum charged be not a colour or a screen for usury, but is only fair and reasonable, it ought to be allowed. This is like the case some few years where *Indian* interest was allowed here on a bond given in *India* (a).

Rule discharged.

(a) *Bodily v. Bellamy*. 2 Burr. 1094.

DAVIES against PIERCE and Others

THIS was an action of replevin for taking the plaintiff's cattle at *Ochobir*. The defendants in their cognizance stated that the *locus in quo* had been immemorially part and parcel of a certain tenement of land called *Bulchystullen* sheepwalk, of which *Benjamin Holloway* and others before, &c. were seised in their demesne as of fee, and then stated a demise to *T. Hugh* for a year, and so from year to year, as whose bailiffs they acknowledged taking the cattle, &c. as a distress for damage feasant: In the second cognizance they derived a title to *T. Hugh* from *Margaret Pryce* of the same premises, and acknowledged, &c. as his bailiffs. The pleas in Bar traversed the *locus in quo* being part and parcel of the said tenement of land called *Bulchystullen*; on which issues were taken in the replication.

Declarations by tenants are admissible evidence after their death to shew that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it not resisted by contrary evidence is decisive.

1787.

DAVIES
against
PIERCE.

This cause was tried at the last Spring great sessions at *Cardigan*, before Mr. *Beard*, when, after the evidence on the part of the defendant was closed, the plaintiff's counsel offered to prove in evidence, that *Hugh John Griffiths*, and *John Griffiths*, his father, who were respectively tenants of *Bulchystullen* and *Llyast Nant Glas*, of which *Ochorbir* is a part, both deceased, did respectively, while in the occupation of the premises, declare that they rented *Llyast Nant Glas* of one *Matthew Evans*, who was never the owner of *Bulchystallen*, which has for a long time belonged to the family of *Price*; that *H. J. Griffiths* declared he paid the same *M. Evans* five shillings yearly and a quarter of mutton for the said *Llyast Nant Glas*; that he declared he was then going to pay the said rent to the said *John Evans* for the said *Llyast Nant Glas*; that he ordered his servant to herd some cattle at *Llyast Nant Glas*, saying he could not otherwise afford to pay *M. Evans* his rent; that *John Griffiths* prevented a certain person from cutting rushes on *Llyast Nant Glas*, and threatened that he would tell *M. Evans* his landlord of his cutting the said rushes, and once took the rushes from the said person, and told him they belonged to *M. Evans*; that about 40 years ago one *Thomas Hugh* rented *Llyast Nant Glas* for one year, and declared that he paid rent either to *M. Evans* or his mother." The defendant's counsel objecting to the admissibility of this evidence, the learned judge refused to admit it, and the jury gave a verdict for the defendants: whereupon the plaintiff's counsel excepted to the judge's opinion, and tendered a bill of exceptions to him, which he signed.

The proceedings were brought here by a writ of error, and in the last term Mr. *Beard* appeared in this court, and acknowledged his seal to the bill of exceptions.

This question was to have been argued by *Bragge*, for the plaintiff, and *Williams* for the defendants; but

The Court were clearly of opinion that the evidence was admissible; and

ASHHURST, J.—said, that the fact of cutting the rushes was decisive; and

BULLER,

BULLER, J.—added that the other question relative to the tenant's declaring that he paid rent for the premises in question had been determined in the cases of *Holloway v. Rakes* (a), and *Doe dem. Foster v. Williams* (b). In the former the lessor claimed as devisee in remainder under a will 27 years ago, under which there was no possession, and therefore seizin in the devisor was necessary to be proved. For this purpose a witness was called to speak to the declarations of the tenant in possession at that time *that he held as tenant to the devisor*: A new trial was moved for on the inadmissibility of this evidence; and it was objected that this was mere hearsay evidence, and that the party making the declaration was not upon oath. But the court held the evidence properly admitted, and the rather so as it did not appear that the defendant had any sort of right, and probably might have come in under the tenant who acknowledged the right of the devisor, as he was of the same name with the tenant; and such confession would certainly be binding on all who claimed under him who made it.

But a difficulty occurring to the court, whether they could grant a *venire de novo*, the question relative to what judgment ought to be given stands over till the next term.

(a) M. 12 G. 3. B. R.

(b) Cowp. 621.

POWELL against PORTHERCH.

THE defendant had been held to bail on an affidavit, which stated that he was indebted to the plaintiff in so much for work and business done by the plaintiff as an attorney, *as appears by the Master's allocatur*.

Bower had moved on a former day that the defendant might give common bail, the affidavit to hold to special bail not being positive.

Lane shewed cause, and observed that if the words "as appears by the Master's allocatur" had been omitted, the affidavit would undoubtedly have been sufficiently positive; and that the insertion of those words did not render the affidavit less certain, because they only pointed at the difference between the sum originally claimed and that allowed by the Master. But still the plaintiff positively swore to the debt due.

1787.

DAVIES
against
PIERCE.

Affidavit to hold to bail that defendant is indebted to the plaintiff in a certain sum, as appears by the Master's allocatur, is not sufficiently positive.

The

The Court were of opinion that the affidavit was not sufficient; because the plaintiff had not sworn that the *debt was still due*, but only that the defendant was indebted to him as *appears by the Master's allocatur*.

Rule absolute.

June 27th.

On this day *Henry Partridge, Esq;* of the *Middle Temple*, and *Foster Bower* and *Edward Law, Esq;* both of the *Inner Temple*, were appointed to be his Majesty's counsel learned in the law.

Lord Mansfield, Chief Justice, was not able to attend during the whole of this term.

The End of TRINITY TERM.

C A S E S

1787.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Twenty-Eighth Year of the Reign of GEORGE III.

FRITH *against* LEROUX and Another.

Wednesday,
Nov. 7th.

THE plaintiff having recovered a judgment in *Hilary* Term 1784 for 800*l.* upon promises against *Aylett* the defendant in the original action, the defendant brought a writ of error in the Exchequer Chamber, and put in bail. In *November* 1785 the judgment of this court was affirmed; and the sum recovered not being paid, debt upon the recognizance was brought against the bail in the same term, and the plaintiff recovered. The bail requested indulgence for a time, which was granted. The only question made was, whether the plaintiff was entitled to interest from the bail upon the sum recovered between the times of signing judgment in *B. R.* and the affirmance of it in the Exchequer Chamber. Interest for the whole time since the time of signing final judgment had been levied under an execution against the bail.

In debt upon recognizance bail in error in the Exchequer Chamber are not liable to pay interest on the judgment between the signing of the judgment in *B. R.* and the affirmance of it in *Cam. Scacc.*

Wood, for the rule contended, that that part of the sum levied which included interest between the times of signing the judgment and affirming it ought to be returned.

Baldwin, contra.

ASHHURST, J.—The question seems to be whether the bail are liable beyond the extent of their engagement, which is for

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the

1787.

FRITH
against
LEROUX.

the principal sum recovered in the original action, and the costs of prosecuting the writ of error: That therefore being the extent of their engagement, we cannot compel them to pay any more.

BULLER, J.—This is not an application to a court of equity, but to a court of law, to enforce the performance of an engagement which the bail have entered into. The recognizance they entered into is with a condition that the defendant in the original action shall prosecute his writ of error, and that if judgment should be affirmed they will pay the debt and costs upon the former judgment, together with such costs as are occasioned by the delay. So that the bail in express terms only promise to pay what was due upon the original judgment and the costs given in the Exchequer Chamber; therefore we are not warranted in giving any more. Thus it stands on the recognizance itself. But this point has been already decided in several cases which have come before the court. In *Cumming v. Hanforth* (a), I moved that the Master might be directed to include interest in the costs to be taxed on non-prossing a writ of error, returnable in parliament, for want of transcribing. The action was brought on a note of hand payable three months after date, which in its nature carried interest; and I cited *Bodily v. Bellamy*, 2 Burr. 1094. Lord Mansfield, said, you are breaking into the whole course of proceedings. When final judgment is given by the court, the demand is liquidated; and no interest can be computed after that time. On debts carrying interest, the jury are now directed to give interest in damages up to the day on which judgment may be signed. And the motion was denied. So in *Smith and Another v. Copestake* (b), *Davenport* shewed cause against a rule which had been obtained by *Dunning* for staying proceedings in an action against the defendant on a recognizance of bail in error, on payment of 848 l. the amount of the damages and costs taxed upon the original judgment in the cause, and of the costs taxed upon the affirmance of the said judgment in the Exchequer Chamber. *Davenport* insisted that the plaintiff was entitled to take interest upon the sum liquidated in the judgment up to the time of the affirmance; and he cited *Welford v. Davison*, 4 Burr. 2127. *Bodily v. Bellamy*. and *White v. The Duke of Newcastle*, M. 15 Geo. 3. B. R. But after the court had taken time to consider, Lord

(a) Hil. 14 Geo. 3. B. R.

(b) M. 16 Geo. 3. B. R.

Mansfield

Mansfield, on the last day of the term delivered the opinion of the court (*Asbburst*, J. being absent) and said that they had considered all the cases, and that they did not warrant the doctrine contended for by *Davenport*. That on affirmance of a judgment in error bail are not liable for more than they have undertaken to pay, namely, the debt and costs which have been adjudged due; and that the case of *White v. the Duke of Newcastle* certainly went by surprise. And the rule was made absolute to stay proceedings on payment of the debt and costs in the cause, and the costs in error of the affirmance of the judgment. Then as to the interest due subsequent to the time of the affirmance, that stands on a different ground; because when the judgment is affirmed, it becomes from that time the debt of the bail: and if an action were brought on that judgment, the jury might give damages for the detention of the debt, so as to include interest up to the time of final judgment. Therefore the bail are liable only for the interest subsequent to the time of affirming the judgment.

1787.

FRITH
against
LEROUX.

GROSE, J.—declared himself of the same opinion.

Rule absolute (a).

Baldwin then mentioned the case of *Zinck v. Langton, Dougl.* 723, n. 3 (b).

(a) There is a difference between the form of the recognizance on writs of error in the Exchequer Chamber and in the King's Bench; in the former the bail engage to pay the sum recovered by the judgment, and such further costs of suit, sum and sums of money, as shall be awarded for delay of ex-

ecution; in the latter they engage to pay the sum recovered by the judgment, as also all such costs and damages as shall be awarded for delay of execution.

(b) *Vide post. Entwistle v. Shepherd.*

COLKETT and Others, Assignees of FALCH, against
FREEMAN and Another.

Thursday,
Nov. 8th.

AT the trial of this cause, which was an action of trover tried before *Buller*, J. at the Sittings after last *Trinity* Term at *Guildhall*, the only question that arose was concerning the act of bankruptcy alleged to have been committed by *Falch*, as to

Where *A.* was denied in the morning, by express order, to the holder of a bill which

was due, it was a complete act of bankruptcy, though he afterwards paid the bill before five o'clock in the same day, and though by the custom of merchants in *London* the payer of a bill has the whole day on which it becomes due, till five o'clock, to discharge it in.—Where an act is a clear unequivocal act of bankruptcy, it cannot be explained by any subsequent circumstances: But where the act is in itself doubtful, it may be explained.

which

1787.

COLKETT
against
FREEMAN.

which the facts were as follows;—*Falch*, being in bad circumstances, on the evening of the 7th of *January* 1786 expressed his concern to his clerk, and his fears, that he should not be able to answer a bill which would become payable the next day; and desired him to come earlier than usual the next morning, and be in the way, and in case the holder of that bill should enquire for him, to deny him. In fact that bill-holder did call the next morning before nine o'clock, and presented a bill for payment, when the clerk gave him the answer, as he was directed, that his master was not at home. Afterwards however, in the course of that day, *Falch* appeared in public, and having procured some money from a friend whom he met he sent for the bill and paid it before five o'clock on that day. The learned Judge directed the jury to find their verdict for the plaintiffs, inasmuch as the act of bankruptcy was complete by the denial of a creditor with intent to delay him, notwithstanding several of the jury, which was a special one, suggested to him at the time, that by the practice of merchants in the city of *London* the payer of a bill has the whole of the day on which it becomes due, till five o'clock, to pay it in. However, upon the Judge's repeating to them his opinion upon the point of law, they found their verdict accordingly.

Piggott, who moved for a new trial, relied upon the ground which had been before suggested by the jury; and questioned whether the bill-holder could be considered as a creditor till after the expiration of the time which by the custom the payer had to discharge it in; and contended also, that in this case the creditor, supposing him to be one then, could not be said to have been delayed, as he had been punctually paid in due time, and could not have protested the bill for non-payment till after five o'clock.

ASHHURST, J.—I have always understood the general rule to be, that where a trader commits an unequivocal act of bankruptcy, nothing that passes afterwards can explain it away. Where indeed the act done is in itself equivocal, there it may be explained by subsequent acts, as by the bankrupt's afterwards appearing in public, or the like. Then the only question here is, whether the act, at the time it was done, was a clear unequivocal act of bankruptcy. From the facts which have been stated, it appears that the bankrupt could only order himself to be denied with a view to delay his creditor; for he himself thought that

that his circumstances were in a desperate situation at that time, and that he should not be able to fulfil his engagements, and directed his clerk to deny him when the bill holder called, which was accordingly done early the next morning. This was a clear act of bankruptcy, and whatever might happen afterwards could not alter the case. It is true that if the payer of a bill of exchange discharge it before five o'clock on the day when it becomes due, that will be a sufficient payment in law in order to prevent a protest; but that is not the question here; what we are now to consider is, whether the denial to a creditor with a view to delay him was a complete act of bankruptcy at the time? I am of opinion that it was; and I believe that this has been so held in several cases.

BULLER, J.—On account of a doubt started at the trial by some of the jury, which was a very respectable one, I was desirous of taking the opinion of the court upon this case, although I myself entertained no doubt upon the subject. But if the rest of the court are now clear that the law laid down by me was right, it will only be putting the parties to further and unnecessary expence to grant a rule to shew cause. It appeared at the trial, that the bankrupt had given himself up as a lost man the night before the morning on which the denial was proved: he was then in desperate circumstances; he had been getting money for some time before in a manner not altogether to his credit, by buying goods of persons for the purpose of turning them into money, who were afterwards obliged to come in as creditors under the commission. Such was his general situation when the denial took place. The jury doubted whether that denial was an act of bankruptcy, because the bill, upon which the demand arose, was paid before five o'clock on that same day, on which it became due: and they desired to know whether, in point of law, the bankrupt had not the whole of the day to pay the bill? I told them that the rule mentioned by them, with respect to the time which the payer of a bill was allowed to discharge it in on the day on which it became due, was a good one; but that they were mistaken in the application of that rule to the present instance. That where the question was what laches of the holder would discharge the indorser, there the former might wait to receive payment the whole of the day on which the bill became due: but that was with a different view. Here the case turned on a different question, whether a denial

1787.

COLKETT
against
FREEMAN.

1787.

COLKETT
against
FREEMAN.

of a creditor with a view to delay him, though but for an hour, was not an act of bankruptcy. For though the words of the act (a) are "*begin to keep house*," yet on the construction of them it has always been held, that a denial to a creditor with a view to delay him was an act of bankruptcy. And I told the jury, that if they were satisfied that the bankrupt denied himself at nine in the morning with a view to delay his creditor, that was in itself a clear act of bankruptcy; and his afterwards appearing in public on that day, and paying the bill before five o'clock in the evening, could not purge that act once committed. A clear act of bankruptcy can in no case be explained. At the trial of this cause a gentleman at the bar mentioned a case which had come before Lord *Mansfield* a few years ago, the circumstances of which were these; a bill having become due, and the drawer being pressed for payment desired the holder to call upon him the next morning at a friend's house in *Bridge-street*, and he would pay him; the holder went accordingly, and was denied at the drawer's request. Upon being asked by his friend if he was aware that he had been committing an act of bankruptcy, he answered with surprise in the negative, and said that he did not mean to do so; and went afterwards and paid the bill. Lord *Mansfield*, in his directions to the jury, told them, that if they were satisfied that the denial had been with a view to delay the creditor at the time, it was an act of bankruptcy; and if so, it could not be purged by paying the bill afterwards. The term of "*purging an act of bankruptcy*" is frequently perverted; and that has often been complained of by Lord *Mansfield*, who has on several occasions taken the opportunity of declaring, that it can only mean, that, if the act done be in itself equivocal, other circumstances may be called in to explain it; but, if the act be a clear unequivocal act of bankruptcy, it cannot be purged or explained away by subsequent circumstances.

GROSE, J.—It seems to me that the directions of the learned Judge were perfectly right; for the only question was whether the denial was with a view to delay the creditor; that was the province of the jury to determine, and they have found by their verdict that it was: and in my opinion they have judged right. The direction therefore being right in point of law, and the verdict right in point of fact, it would be a loss of time,

(a) 13 Eliz. c. 7.

and an unnecessary encrease of expence, to grant even a rule to shew cause,

1787.

Rule refused.

COLKETT
against
FREEMAN.

On a subsequent day *Piggot* renewed his application: but the Court, entertaining the same opinion which they had before delivered, refused to grant the rule.

LICKBARROW and Another against MASON and Others.

Friday,
Nov. 9th.

TROVER for a cargo of corn. Plea the general issue. The plaintiffs, at the trial before *Buller, J.* at the *Guildhall* Sittings after last *Easter* Term, gave in evidence that *Turing* and Son, merchants at *Middlebourg* in the province of *Zealand*, on the 22d. *July* 1786, shipped the goods in question on board the *Endeavour* for *Liverpool* by the order and directions and on the account of *Freeman* of *Rotterdam*. That *Holmes*, as master of the ship, signed four several bills of lading for the goods in the usual form unto order or to assign; two of which were indorsed by *Turing* and Son in blank, and sent on the 22d. *July* 1786 by them to *Freeman*, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by *Turing* and Son, and the remaining one was kept by *Holmes*. On the 25th. *July* 1786, *Turing* and Son drew four several bills of exchange upon *Freeman*, amounting in the whole to 477*l.* in respect of the price of the goods, which were afterwards accepted by *Freeman*. On the 25th. of *July* 1786 *Freeman* sent to the plaintiffs the two bills of lading together with the invoice which he had received from *Turing* and Son in the same state in which he received them, in order that the goods might be taken possession of and sold by them on *Freeman's* account; and on the same day *Freeman* drew three sets of bills of exchange to the amount of 520*l.* on the plaintiffs, who accepted them and have since duly paid them. The plaintiffs are creditors of *Freeman* to the amount of 542*l.* On the 15th. *August* 1786, and before the four bills of exchange drawn by *Turing* and Son on *Freeman* became due, *Freeman* became a bankrupt: those bills were regularly protested, and *Turing* and Son have since been obliged, as drawers, to take them up and pay them. The price of the goods so shipped by *Turing* and Son

The consign-
or may stop
goods in tran-
sit before
they get into
the hands of
the consignee,
in case of the
insolvency
of the con-
signee: but
if the con-
signee assign
the bills of
lading to a
third person
for a valuable
considera-
tion, the right
of the con-
signor as
against such
assignee is
devested.
There is no
distinction
between a
bill of lading
indorsed in
blank, and
an indorse-
ment to a
particular
person.

is

1787.

LICKBAR-
ROW
against
MASON.

is wholly unpaid. *Turing* and Son hearing of *Freeman's* bankruptcy on the 21st. of *August* 1786 indorsed the bill of lading so retained by them to the defendants, and transmitted it to them, with an invoice of the goods, authorising them to obtain possession of the goods on account of and for the use and benefit of *Turing* and Son, which the defendants received on the 28th. *August* 1786. On the arrival of the vessel with the goods at *Liverpool* on the 28th *August* 1786, the defendants applied to *Holmes* for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them for and on account of and to and for the use and benefit of *Turing* and Son. The defendants sold the goods on the account of *Turing* and Son, the proceeds whereof amounted to 557 l. Before the bringing of this action the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the plaintiffs or *Freeman* have paid or offered to pay the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.

This was argued in last *Trinity* Term by *Erskine* in support of the demurrer, and *Manly* against it; and again on this day by *Shepherd* in support of the demurrer, and *Bearcroft* contra.

Shepherd (a), after observing that, as the defendants were the agents of *Turing* and Son, the general question was to be considered as between the confignor and the indorsee of the bill of lading, contended First, that, as between the vendor and vendee of goods, the former has a right to stop the goods *in transitu*, if the latter become insolvent before the delivery of them. And secondly, that such right cannot be divested by the act of the vendee's indorsing over the bill of lading to a third person. The first question has been so repeatedly determined, that it is scarcely necessary to cite any authorities in support of it. [The plaintiffs' counsel admitted the position.] Then in order to determine the second, it is material to consider the nature of a bill of lading. A bill of lading cannot by any means be construed into a contract on the part of the confignor to deliver the goods mentioned in it to the consignee: it is only an undertaking by the captain to deliver the goods to the order of the shipper. As between the confignor and the consignee, it is a bare authority to the captain

(a) As the second argument, with the judgment of the court, comprehended every thing that was said upon the subject, the former argument is omitted.

to deliver, and to the consignee to receive them. That this is the true nature of a bill of lading appears from all the writers upon mercantile law, as *Molloy*, *Postlethwayte*, and *Beawes*. If it be any other sort of instrument, it must be contended to amount to a contract by the consignor to deliver the goods to the consignee: but no such contract arises upon it, because the consignor is not even a party to it; and no action could be framed upon it against the consignor. Then, if it be only a bare authority to the one to carry, and to the other to receive, the goods, the consignee cannot transfer a greater right than he has; neither can the right of the consignor be divested by the act of the consignee. If a bill of lading be a negotiable instrument, and conveys an indefeasible property in the goods, it must be so by the custom of merchants: but such custom is not to be found in any of the books treating upon the subject. There are cases which establish a contrary doctrine, in which the courts have held that the rights of the assignees are the same as the rights of the original consignees. It cannot indeed be disputed but that, as between the consignee and the indorsee, the indorsement of a bill of lading is a complete transfer of the property which the consignee has in it: but the cases go no farther. The case of *Snee and Prescott* (a) is precisely similar to the present. There the bill of lading was indorsed in blank, and afterwards indorsed over by the consignee to his assignees: those assignees were some of the defendants in that suit, and they stood in the same situation with the present plaintiffs. In that case, before the goods arrived, and after the indorsement of the bill of lading by the consignee, the consignee having become a bankrupt, the goods were stopped *in transitu* by order of the consignor by an indorsement of the bill of lading, which was left with him, to another of the defendants: there Lord *Hardwicke* decreed that the indorsement did not absolutely transfer the property in the goods, in the event of the consignee's becoming a bankrupt before the arrival of the goods; that, as the goods had been stopped *in transitu* by order of the consignor, he had a right to detain them till the sum which he was in advance to the consignee on account of them was paid; and that the surplus arising from the produce of the goods should be paid to the indorsees of the consignee. Now unless Lord *Hardwicke* had been of opinion that the indorsement by the consignee did not absolutely transfer the property in the goods,

1787.

LICKBAR-
ROW
against
MASON.

(a) 1 Atk. 245.

1787.

LICKBAR-
ROW
against
MASON.

he would have decreed that the indorsee should have been first paid the money which they had advanced upon the credit of the bill of lading, and then that the surplus should have been paid to the consignor: but instead of that he gave a priority to the consignor. This doctrine is not only laid down in a court of equity, but confirmed in a court of law in the case of *Savignac* and *Cuff* (a), where the same question was tried between the same parties as the present. There *Selvetti*, a merchant in *Italy*, consigned a quantity of skins to *Lingham* residing in *London*, and sent him a bill of lading indorsed in blank. *Lingham*, the consignee, indorsed it to *Savignac* for a valuable consideration at the invoice price, shewing him at the same time the letters of advice and the bills of parcels. The consignee not accepting the bills of exchange which the consignor had drawn upon him for the amount of the goods, the consignor indorsed the bill of lading remaining in his hands to *Cuff*, the defendant, with orders to seize the goods before they got into the hands of the consignee, which he did: and the action was brought against him by the indorsee of the consignee to recover the value of the goods. *Wallace*, Solicitor General, there argued that by the indorsement of the bill of lading the property was transferred. But Lord *Mansfield* was of opinion, that the consignor had a right to stop the goods *in transitu* in case of the insolvency of the consignee, and that the plaintiff, standing in the same situation with the original consignee, had lost his lien. Lord *Mansfield* was first of opinion that there was a distinction between bills of lading indorsed in blank and otherwise; but he afterwards abandoned that ground. But in that case, as the consignor had in point of fact received 150*l.* from the consignee, there was a verdict for the plaintiff for that sum. So that the result of the verdict was, that the consignor was entitled under those circumstances to retain all the goods consigned, deducting only the sum which he had actually received for part. Both these cases establish the construction of the bill of lading contended for; and it is to be observed that the verdict in the latter one was acquiesced in. And indeed to construe it otherwise would be opening a great door to fraud, and would be placing the indorsee of a consignee of a bill of lading in a better situation than the consignee himself in case of his insolvency. Suppose the consignee assigns over to a third person, who becomes insolvent before the delivery

(a) *Sittings at Guildhall, cor. Lord Mansfield, Tr. 1778.*

1787.

LICKBAR-
ROW
against
MASON.

of the goods, such assignee would then, notwithstanding his insolvency, have a right to get the goods into his possession; for if the act of indorsement absolutely divests the property out of the confignor, he can never afterwards get possession of the goods again; or else this consequence would follow, that the vendor would have a right to seize the goods *in transitu* till the indorsement, by which his right would be divested, and that by the act of insolvency of the indorsee it would be re-vested. This has never been considered to be the same sort of instrument as a bill of exchange: they are not assimilated to each other in any treatise upon the subject: nay bills of exchange are said to be *sui juris*. In their nature they are different; a bill of exchange always imports to be for value received; but the very reverse is the case with a bill of lading. For in few, if any, instances is the confignor paid for his goods till delivery: and bills of exchange were first invented for the purpose of remitting money from one country to another, which is not the case with bills of lading. As to the case of *Wright and Campbell* (a), which may be cited on the other side, it will perhaps be said that the court awarded a new trial only on the ground of fraud: but *non constat* that, if there had been no suspicion of fraud, a new trial would not have been granted. So that the law cannot be considered to have been decided in that case; for when a new trial is moved for, if the facts warrant it, the court award a new trial without going into the law arising upon those facts. In such cases the law is still left open to be considered on a different finding; since it would be nugatory to determine the point of law, which may not perhaps be applicable to the facts when found. At the most, there is only an inference of law to be drawn from that case, which is not sufficient to overturn established principles. Besides, this case is distinguishable from that; for there it appeared that the consignee was the factor of the confignor, and as such might bind his principal by a sale.

Bearcroft, contra. The question is, whether the *bond fide* indorsement for a valuable consideration of a bill of lading to a third person is not an absolute transfer of the whole property? This question is of infinite importance to the mercantile world, and has never yet been put in a way to receive a solemn decision in a court of law. For at most it has only been considered in a court of equity upon equitable principles, or at *nisi prius* in a

(a) 4 Burr. 2046.

1787.

LICKBAR-
ROW
against
MASON.

case the correct state of which is to be doubted. The form of the bill of lading is material to be attended to in determining this case; it is that the goods are to be delivered "to order" or to assigns; therefore on the very face of the instrument there is an authority to the captain to deliver them to the consignee or to his assigns; and the question here is who are his assigns. As between the consignor and consignee, the rule contended for is not now to be disputed, since it has been confirmed by so many authorities; though perhaps it were much to be wished that it had never been established: But there will be danger in extending it farther. With respect to the case of *Snee* and *Prescot*, when it is considered who were the parties to the cause, in what court, and upon what principles, it was decided, it will not be found sufficient to determine the present case. The actors, the plaintiffs, were not the innocent purchasers of a bill of lading; they were the assignees of a bankrupt, and prayed by their bill to get possession of the goods, notwithstanding they had not paid for them. But this is a case between the consignor and third persons who have paid a valuable consideration for the goods; that case was likewise in a court of equity, where the leading principle is that he, who seeks equity, must first do what is equitable; there too the decision was founded in some measure on the custom of the *Leghorn* trade, and the construction of the statute relating to mutual credit; so that there were united a number of circumstances which taken altogether induced Lord *Hardwicke's* decree, and which do not exist in the present case. And it is to be remarked that Lord *Hardwicke*, thinking it a harsh demand against the consignors, said "he would lay hold on any thing to save the advantage" which the consignors had by regaining the possession of the goods before they got into the hands of the indorsees of the consignee. Then as to the case of *Savignac* and *Cuff*, that had not even the authority of a *nisi prius* determination; Lord *Mansfield* gave no opinion upon this question; for though he said there was no doubt but that, as between the vendor and the vendee, the former might seize the goods *in transitu*, if the latter became insolvent before they were delivered, yet there he stopped; so that the inclination of his mind may be presumed to have been against extending the rule. And after all, the whole circumstances of that case were left to the consideration of a jury.

1787.

LICKBAR-
ROW
against
MASON.

jury. Since Lord *Raymond's* (a) time it has been taken to be clear and established law that a general indorsement of a bill of lading does transfer the property. And *Holt* Ch. J. then said "that a consignee of a bill of lading has such a property as that he may assign it over." It has now been contended that the right of the consignor ought not to be divested by the act of the consignee: but it is not by the act of the consignee alone; for the consignor has by his own act enabled the consignee to defeat his right. If he had been desirous of restraining the negotiability of the bill of lading, instead of making a general indorsement, he should have made a special indorsement to his own use. And then the holder of the bill of lading would have been considered as a trustee for the consignor. The custom of merchants has established that the delivery of a bill of lading transfers the whole property. *Evans v. Martlett*, 1 *Ld. Raym.* 271. *Wright v. Campbell*, 4 *Burr.* 2046. and *Caldwell v. Ball*, ante, 1 vol. 205 (b). Then it has been said that a bill of lading is not transferable like a bill of exchange: but the custom of merchants has made that transferable which in its nature perhaps is not so; and the cases above referred to decide that point. Though a new trial in the case of *Wright* and *Campbell* was granted on a suspicion of fraud, and the law was not expressly adjudged; yet from what was said by the court it may be collected that no new trial would have been awarded if no fraud had existed; and the opinion of Lord *Mansfield*, as far as it goes, is expressly in point. But above all arguments public convenience ought to have a considerable influence in the decision of this question. By the constant course and the universal consent and opinion of merchants bills of lading are negotiable; it is highly convenient to trade that they should be so; and if this case should be determined against the plaintiffs, one of the principal currents of trade will be stopped: besides it will be a hardship on an innocent vendee.

Shepherd in reply. Though there may be some hardship on the vendee if he is to suffer, yet the hardship would be equally great on the vendor, who would by a decision against him be compelled to deliver up the possession of his goods, though at the time of the delivery he knew that he should not receive any consideration for them. But convenience requires that, if one of these two innocent persons must suffer, the loss should

(a) 1 *Ld. Raym.* 271.(b) Vide *Hibbert* against *Carter*, ante 1 vol. 745.

1787.

LICKBAR-
ROW
against
MASON.

be sustained by the consignee. For when a vendor consigns his goods, he knows that by the general law he has a right to stop them *in transitu*, if the consignee become insolvent before delivery. But when an indorsee takes an assignment of a bill of lading, he takes it with a knowledge of, and subject to, that general right which the vendor has. Though the case of *Snee* and *Prescot* was determined in a court of equity, yet that court could not alter the effect and nature of a legal instrument; which it must have done in that case if the right of an indorsee is to be preferred to the consignor. Suppose *A.* sends a bill of lading of goods to *B.* and the goods themselves are in fact never sent out of his possession, if the indorsement of the bill of lading can be said to transfer the property, the indorsee would have a right to recover the goods as against the original consignor, who had never parted with the possession of them. So that the rule contended for would not only devert the right which the consignor has to seize the goods *in transitu*, but would also compel him to part with his goods, without receiving any consideration, although he had never relinquished the possession. The meaning of the dictum of Lord *Holt*, in *Evans* and *Martlett*, is only that the consignee may assign over that right which he has. The case of *Caldwell v. Ball* was merely a question between two solvent indorsees, both of whom had an equitable title; and that case only decided that he who first got possession of one of the bills of lading was entitled to the goods; and there too the court determined in favor of him who had the possession.

ASHHURST, J.—As this was a mercantile question of very great importance to the public, and had never received a solemn decision in a court of law, we were for that reason desirous of having the matter argued a second time rather than on account of any great doubts which we entertained on the first argument. We may lay it down as a broad general principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. If that be so, it will be a strong and leading clue to the decision of the present case. It has been argued that it would be very hard on a consignor, who has received no consideration for his goods, if he should be obliged to deliver them up in case of the insolvency of the consignee, and come in as a creditor under his commission for what he can get. That is certainly true:

true: but it is a hardship which he brings upon himself. When a man sells goods, he sells them on the credit of the buyer: if he deliver the goods, the property is altered, and he cannot recover them back again, though the vendee immediately become a bankrupt. But where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the mean time, the vendor may stop the goods *in transitu*. But, as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud. The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect therefore this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has made it an indorsable instrument. So it is like a bill of exchange; in which case, as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and an indorsee; and the reason is because it would be enabling either of the original parties to assist in a fraud. This rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law, which is, that as between the original parties the consideration may be enquired into; though when third persons are concerned it cannot. This is also the case with respect to a bill of lading. Though the bill of lading in this case was at first indorsed in blank, it is precisely the same as if it had been originally indorsed to this person: for when it was filled up with his name, it was the same as if made to him only. Then what was said by Lord *Mansfield* in the case of *Wright and Campbell* goes the full length of this doctrine; "If the goods be *bonâ fide* sold by the factor at sea, (as they may be, where no other delivery can be given,) it will be good notwithstanding the statute 21 *Jac.* 1. c. 19. The vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: and the owner can never dispute with the vendee, because the goods were sold *bonâ fide* and by the owner's own authority." Now in this case the goods were trans-

1787.

LICKBAR-
ROW
against
MASON.

1787.

LICKBAR-
ROW
a-ainst
MASON.

transferred by the authority of the vendor, because he gave the vendee a power to transfer them; and being sold by his authority, the property is altered. And I am of opinion that this right of the assignee could not be defeated by any subsequent circumstances.

BULLER, J.—This case has been very fully, very elaborately, and very ably argued, both now and in the last term; and though the former arguments on the part of the defendant did not convince my mind, yet they staggered me so much that I wished to hear a second argument. Before I consider the effect of the several authorities which have been cited, I will take notice of one circumstance in this case which is peculiar to it; not for the purpose of founding my judgment upon it, but because I would not have it supposed in any future case that it passed unnoticed, or that it may not hereafter have any effect which it ought to have. In this case it is stated that there were four bills of lading: it appears by the books treating on this subject that according to the common course of merchants there are only three; one of which is delivered to the captain of the vessel, another is transmitted to the consignee, and the third is retained by the consignor himself as a testimony against the captain in case of any loose dealing. Now if it be at present the established course among merchants to have only three bills of lading, the circumstance of there being a fourth in this case might, if the case had not been taken out of the hands of the jury by the demurrer, have been proper for their consideration. I am aware that that circumstance appears in the bill, on which is written, “In witness the master hath affirmed to four bills of lading, all of this tenor and date.” But we all know that it is not the practice either of persons in trade or in the profession to examine very minutely the words of an instrument, which is partly printed and partly written; and if we only look at the substance of such an instrument, this may be the means of enabling the consignee to commit a fraud on an innocent person. Then how stood the consignee in this case? He had two of the bills of lading, and the captain must have a third; so that the assignee could not imagine that the consignor had it in his power to order a delivery to any other person. But I mean to lay this circumstance entirely out of my consideration in the present case, which I think turns wholly on the general question: and I make the question even more general than was made at the bar, namely,

namely, whether a bill of lading is by law a transfer of the property. This question has been argued upon authorities; and before I take notice of any particular objections which have been made, I will consider those authorities. The principal one relied on by the defendants is that of *Snee* and *Prescot*; now, sitting in a court of law, I should think it quite sufficient to say that that was a determination in a court of equity, and founded on equitable principles. The leading maxim in that court is, that he who seeks equity must first do equity. I am not disposed to find fault with that determination as a case in equity; but it is not sufficient to decide such a question as that now before us. Lord *Hardwicke* has, with his usual caution, enumerated every circumstance which existed in the case: and indeed he has been so particular, that if the printed note of it be accurate, which I doubt, it is not an authority for any case which is not precisely similar to it. The only point of law in that case is upon the forms of the bills of lading; and Lord *Hardwicke* thought there was a distinction between bills of lading indorsed in blank, and those indorsed to particular persons: but it was properly admitted at the bar that that distinction cannot now be supported. Thus the matter stood till within these thirty years; since that time the commercial law of this country has taken a very different turn from what it did before. We find in *Snee* and *Prescot*, that Lord *Hardwicke* himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord *Mansfield*, who may be truly said to be the founder of the commercial law of this country. I hope to shew, before I have finished my judgment, that there has been no inconsistency in any of his determinations:

1787.

LICKBAR-
ROW
against
MASON.

1787.

LICKBAR-
ROW
against
MASON.

nations: but if there had, if I could not reconcile an opinion which he had delivered at *Nisi Prius* with his judgment in this court, I should not hesitate to adopt the latter in preference to the former: and it is but just to say, that no Judge ever sat here more ready than he was to correct an opinion suddenly given at *Nisi Prius*. First, as to the case of *Wright* and *Campbell*, that was a very solemn opinion delivered in this court. In my opinion that is one of the best cases that we have in the law on mercantile subjects. There are four points in that case, which Lord *Mansfield* has stated so extremely clear that they cannot be mistaken. The first is, what is the case as between the owner of the goods and the factor; the second, as between the consignor and the assignee of the factor *with notice*; thirdly, as between the same parties *without notice*; and fourthly, as to the nature of a bill of sale of goods at sea in general. It is to be recollected that the case of *Wright* and *Campbell* was decided by the Judge at *Nisi Prius* upon the ground that the bill of lading transferred the whole property at law; and when it came before this court on a motion for a new trial, Lord *Mansfield* confirmed that opinion; but a new trial was granted on a suspicion of fraud: therefore it is fair to infer, that if there had been no fraud the delivery of the bill of lading would have been final. If there be fraud, it is the same as if the question were tried between the consignor and the original consignee. According to a note of *Wright* and *Campbell*, which I took in court, Lord *Mansfield* said, that since the case in Lord *Raymond* it had always been held that the delivery of a bill of lading transferred the property at law: if so, every exception to that rule arises from equitable considerations which have been adopted in courts of law. The next case is that of *Savignac* and *Cuff*, the note of which is too loose to be depended upon: but there is a circumstance in that case, which might afford ample ground for the decision; for I cannot suppose that Lord *Mansfield* had forgotten the doctrine which he laid down in this court in *Wright* and *Campbell*. There he observed very minutely on what did not appear at the trial, that no letters were produced, and that no price was fixed for the goods: but in *Savignac* and *Cuff* the plaintiff had not only the bills of lading and the invoice, but he had also the letters of advice, from which the real transaction must have appeared; and if it appeared to him that *Selvetti* had not been paid for the goods, that might have been a ground for
the

1787.

LICKBAR-
ROW
against
MASON.

the determination. The case of *Hunter and Beal* (a) does not come up to the point now in dispute; it only determines what is admitted, that, as between the vendor and vendee, the property is not altered till delivery of the goods. With respect to the case of *Stokes and La Riviere* (b), perhaps there may be some doubt about the facts of it: however, it was determined upon a different ground; for the goods were in the hands of an agent for both parties: that case therefore does not impeach the doctrine laid down in *Wright and Campbell*. It has been argued at the bar, that it is impossible for the holder of a bill of lading to bring an action on it against the consignor: perhaps that argument is well founded: no special action on the bill of lading has ever been brought; for if the bill of lading transfers the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is the proper form of action. If an action is brought by a vendor against a vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered. Then it has been said that no case has yet decided that a bill of lading does transfer the property: but in answer to that it is to be observed, that all the cases upon the subject, *Evans v. Martlett*, *Wright v. Campbell*, and *Caldwell v. Ball*, and the universal understanding of mankind, preclude that question. The cases between the consignor and consignee have been founded merely on principles of equity, and have followed up the principle of *Snee and Prescott*; for if a man has bought goods, and has not paid for them, and cannot pay for them, it is not equitable that he should prevent the consignor from getting his goods back again, if he can do it before they are in fact delivered. There is no weight in the argument of hardship on the vendor: at any rate that is a bad argument in a court of law; but in fact there is no hardship on him, because he has parted with the legal title to the consignee. An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all: the answer is, that under those circumstances a bill of lading could not possibly exist, if the transaction were a fair one; for a bill of lading is an acknowledgment by the captain of having received the goods on board his ship: therefore it would be a fraud in the captain to sign such a bill of

(a) Sittings after Trin. 1785 at Gui'dball, before Lord Mansfield, Ch. J. (b) Hil. 25 Geo. 3.
2 lading,

1787.

LICKBAR-
ROW
against
MASON.

lading, if he had not received goods on board; and the consignee would be entitled to his action against the captain for the fraud. As the plaintiff in this case has paid a valuable consideration for the goods, and there is no colour for imputing fraud or notice to him, I am of opinion that he is entitled to the judgment of the court.

GROSE, J.—After this case has been so elaborately spoken to by my brethren, it is not necessary for me to enter fully into the question, as I am of the same opinion with them. But I think that the importance of the subject requires me to state the general grounds of my opinion. I conceive this to be a mere question of law, whether, as between the vendor and the assignee of the vendee, the bill of lading transfers the property. I think that it does. With respect to the question as between the original consignor and consignee, it is now the clear known and established law that the consignor may seize the goods *in transitu*, if the consignee become insolvent before the delivery of them. But that was not always the law. The first case of that sort was that of *Wiseman and Vandeputt* in chancery (a), when, on the first hearing, the Chancellor ordered an action of trover to be brought, to try whether the consignment vested the property in the consignees; and it was then determined in a court of law that it did: but the court of equity thought it right to interpose and give relief; and since that time it has always been considered, as between the original parties, that the consignor may seize the goods before they are actually delivered to the consignee in case of the insolvency of the consignee. But this is a question between the consignor and the assignee of the consignee, who do not stand in the same situation as the original parties. A bill of lading carries credit with it: the consignor by his indorsement gives credit to the bill of lading, and on the faith of that money is advanced. The first case that I find, where an attempt was made to introduce the same law between the consignor and the indorsee of the consignee, is that of *Snee and Prescott*; but as my brother *Buller* has already made so many observations on that case, it would be but repetition in me to go over them again, as I entirely agree with him in them all, as well as in those which he made on the other cases. Therefore I am of opinion that there should be judgment for the plaintiff.

Judgment for the plaintiff.

(a) 2 Vern. 203.

1787.

Friday,
Nov. 9th.

The KING against WYER.

THE defendant had been committed under the 2 Geo. 3. c. 28. for receiving part of a cargo belonging to a vessel in the *Thames*, knowing the same to be stolen. And being now brought up by *habeas corpus*,

Fielding and *Garrow* moved that he might be bailed; for though he was committed as for a felony, yet under the 2 Geo. 3. c. 28. he ought only to have been committed as for a misdemeanor. The twelfth section of that statute enacts "that every person who shall buy or receive any part of a cargo, &c. knowing the same to be stolen, shall, being thereof convicted by due course of law, (although the principal felon has not been convicted of stealing or unlawfully procuring the same), be transported for fourteen years to any of his majesty's colonies or plantations in *America*, according to the laws in force for the transportation of felons." They contended that the latter words did not constitute a felony, but only explained the manner and time of the punishment.

Shepherd opposed the prisoner's being bailed.—By the 3 & 4 W. & M. c. 9. s. 4. receivers of stolen goods may be prosecuted as felons. By the 1 An. st. 2. c. 9. s. 2. they may be punished as for a misdemeanor, where the principal felon is not convicted. Then came the statute 2 Geo. 3. c. 28., by which the offender may be prosecuted for a felony. For though the 12th section says, he shall be transported for fourteen years to any of his majesty's colonies or plantations in *America*; yet by the fourteenth section any person stealing or unlawfully receiving stolen goods, knowing the same to be stolen, shall, on discovering two other offenders, be entitled to a pardon for all such felonies. And,

The Court being of that opinion,

The prisoner was remanded.

Persons receiving any goods, &c. belonging to a vessel in the *Thames*, knowing the same to be stolen, may be prosecuted for a felony under 2 Geo. 3. c. 28.

1787.

Saturday,
Nov. 10th.ENTWISTLE and Others *against* SHEPHERD and Others.

The court will not stay proceedings in debt upon a judgment while a writ of error is depending, if the writ of error appears to be merely for the purpose of delay. In debt on a judgment affirmed in error, the jury by way of damages may give interest upon the sum recovered by the judgment from the time of signing it, where by the practice of the court in which error is brought such interest is not allowed in costs upon the affirmation.

THIS action was brought on a judgment recovered in the Common Pleas. The defendants first brought a writ of error in this court upon the judgment, and then brought a writ of error returnable in parliament; after which they non-prof'd the first writ of error, and then obtained a rule to shew cause why the proceedings in the action in this court should not be stayed pending the second writ of error.

Erskine and *Law* shewed cause against the rule, insisting that this rule was not a matter of course but was purely discretionary in the court. If it be in the discretion of the court, the defendants themselves have shewn that the writs of error were brought for the purpose of vexation and delay, and therefore this rule ought to be discharged. Suing out the second writ of error is irregular, because the former writ of error was at that time depending in this court, so that there was then no judgment here to warrant the writ of error in parliament. Besides if the proceedings be now stayed, the plaintiffs will be deprived of interest on the original judgment in the Common Pleas between the times of signing the judgment in this court and the affirmation of it in the House of Lords. For the statute 3 *Hen. 7. c. 10.* which allows *costs and damage* to the party whose execution is delayed at the discretion of the *justice* before whom the writ of error is sued, does not apply to the case of writs of error in parliament: it only relates to writs of error in courts of law.

Mingay and *Baldwin* relied on it's being a mere matter of course to grant the application, without any other foundation than the circumstance of there being a writ of error depending.

(a) **BULLER, J.**—The mode of making this application shews that it is not a matter of course to stay proceedings pending a writ of error. For a rule is first obtained to shew cause why the proceedings should not be stayed; which would be absurd if the rule were granted of course. Then if it be discretionary there cannot be a stronger case than the present in which the rule ought not to be granted. It appears by the defendants' own conduct that the writ of error has been sued out with-

(a) *Ashburst, J.* was absent.

out any foundation for it. They have brought a writ of error in parliament and then non-prof'd their first writ of error, which can only be for vexatious purposes. Therefore I think we ought not to stay the proceedings. It has been said that, if this rule were made absolute, the plaintiffs would be deprived of interest on the judgment pending the writ of error in parliament: it is a question for a jury to say whether or not they will give interest on the judgment in the name of damages. For interest may be recovered in an action on the judgment, if it be not the practice of the court to allow interest in the costs. Whether the court in which error is brought can allow interest or not depends on the statute of *Hen. 7.*

1787.

ENTWISTLE
against
SHEPHERD.The post. 300.
V. 2. Ves. Jun.
162.

After the judgment of the court was given the other day in *Frith and Leroux (a)*, the case of *Zinck and Langton (b)* was mentioned on a supposition that they were contradictory decisions: but on looking into the case of *Zinck and Langton*, it does not apply to that of *Frith and Leroux*, as they are perfectly consistent. In the latter, the proceedings were against the bail; and we said that on the terms of the recognizance they were not liable for interest on the judgment between the times of signing and affirming the judgment. But under the statute of *Hen. 7.* it is now settled that the party is to pay interest on the judgment; and provided by the course of the court interest is not computed in the allowance of costs, the jury would give interest in the name of damages.

GROSE, J.—This application is not a matter of course, but is made to the discretion of the court. In general I do not approve of actions brought on judgments, because they are vexatious and oppressive; and when that appears to be the case, the court ought not to favor them. But in the present case, the vexation is on the part of the persons making this application. Therefore I think we ought to discharge the rule with costs.

(c) Rule discharged with costs.

(a) *Ante*, 57.

(b) *Daughl.* 723. n. 3.

(c) Similar applications were afterwards

refused in this term, in *Carter v. Roberts*, and *Butt v. Mow*; it appearing that the writs of error were brought for the purpose of delay.

1787.

Tuesday,
Nov. 13th.

Though a tradesman is induced to send goods upon credit to another by a promise made in these words, "If you do not know him, you know me, and I will see you paid;" yet this is void by the statute of frauds, not being in writing. There is no distinction between a promise to pay for goods furnished for the use of another made before they are delivered, and after.

MATSON and Another *against* WHARAM.

THIS was an action for goods sold and delivered, and tried before *Wilson, J.* at the last Assizes at *Kingston upon Hull*, when a verdict was found for the plaintiffs, subject to the opinion of the court on the following case;

In *January 1785*, the defendant *Wharam* applied to *Matson*, one of the plaintiffs, and asked him if he was willing to serve one *Robert Coulthard* of *Pontefract* with groceries; he answered they dealt with no body in that part of the country, and did not know *Coulthard*; to which the defendant, *Wharam*, replied, if you do not know him you know me, and I will see you paid. *Matson* then said he would serve him; and *Wharam* answered he is a good Chap, but I will see you paid. That a letter was afterwards received by the plaintiffs from *Coulthard*, containing an order for goods to the amount of 7*l.* and the goods were afterwards sent to *Coulthard* accordingly. The plaintiffs made *Coulthard* the debtor for these goods in their books. They afterwards applied to *Coulthard* for payment of the debt by letter, and receiving no answer, they then applied to the defendant, *Wharam*, who refused to pay the money. There was no promise in writing made by the defendant. The question for the opinion of the court is, Whether the plaintiffs are entitled to recover.

Garrow, for the plaintiffs, attempted to take a distinction which had been before taken in *Jones v. Cooper* (a), and *Mawbrey v. Cunningham*, there cited, between a promise for the payment of goods for another person before delivery and after; and contended, that in the former case it amounted to an original undertaking, and so was not within the statute of frauds. And he also cited *Read v. Nash*. 1 *Wils.* 305. *Fish v. Hutchinson*. 2 *Wils.* 94. and *Peckham v. De Faria*. M. 22 Geo 3. B. R. But the Court were clearly of opinion that that distinction had been over-ruled; and

BULLER, J.—added, that he argued the case in *Cowper*, the facts of which were these; a person, who was going abroad, wished to make some provision for his mother-in-law in his ab-

(a) *Cowp.* 227.

sence, and said to a baker, "you must supply my mother-in-law with bread, and I will see you paid:" that case was tried before *Nares, J.* at *Bristol*. I was for the plaintiff; and cited the case of *Mawbray v. Cunningham (a)*, in which Lord *Mansfield* said, "this is promise made before the debt accrues; and what is the reason of the tradesman's requiring that promise? It is because he will not trust the person for whose use the goods are intended;" and the plaintiff obtained a verdict. But *Nares, J.* over-ruled this determination, and nonsuited the plaintiff; and this court afterwards refused to grant a new trial. If this were a new question, the leaning of my mind would be the other way; for Lord *Mansfield's* reasoning in the case of *Mawbray and Cunningham* struck me very forcibly. But the authorities are not now to be shaken; and the general line now taken is, that, if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds.

Lambe was to have argued for the defendant.

Per Curiam,

Judgment for the defendant.

(a) Sittings after Hil. 1773, at Guildhall.

MILWARD *against* THATCHER.

Tuesday,
Nov. 13th.

THESE were two issues directed by this court to try, first, whether the defendant was duly elected Town Clerk, or Common Clerk, of the corporation of *Hastings* for life. And secondly, whether the plaintiff was duly elected Town Clerk, or Common Clerk, for the said corporation of *Hastings*.

These issues were tried before Mr. Justice *Gould* at the Assizes held at *Lewes* for the county of *Sussex* on Saturday the 4th August 1787, when the jury found a verdict for the plaintiff on both issues, subject to the opinion of this court upon the following case;

That the borough of *Hastings* is a borough by prescription. That the town clerk of the said borough has been immemorially elected by the mayor, jurats, and freemen, on the third Sunday after *Easter* in every year. That, in pursuance of such immemorial usage, the defendant was on the third Sunday after *Easter*, in the year 1782 elected such clerk by the mayor and jurats, who

A jurat of the corporation of *Hastings* may be elected town clerk of the said corporation. But the two offices are incompatible, and the acceptance of the latter (though an inferior office) will vacate the former.

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1787.

MATSON
against
WHARAM.

1787.

MILWARD
against
THATCHER.

are magistrates exercising judicial authority within the said borough, and freemen, pursuant to such custom; and that the said *John Thatcher* was annually elected and sworn into the said office every year from the year 1782 till *Sunday* the 29th *April* 1787; on which day the plaintiff was elected town clerk by the mayor, jurats, and freemen, and sworn into the said office, agreeable to the usage aforesaid. That the said plaintiff at the time of his said election was and still is a jurat. That the plaintiff hath never acted as a jurat since his election to the office of town clerk; but hath ever since acted as town clerk of the said borough, but without the consent of the defendant. That there are within the said borough twelve jurats who sit as judges in a court of record immemorially holden within the said borough; and also hold pleas of the crown. That the mayor and two jurats may hold such court of sessions: But that all the jurats have a right to attend as judges without being summoned. That there have been many instances within the said borough of jurats being elected to and serving the office of town clerk.

Shepherd for the plaintiff. The first issue is put out of the question by the finding of the jury. The points now to be considered arise upon the second issue, which respects the validity of the plaintiff's election; and upon this two questions arise; 1st, Whether the offices of jurat and town clerk of the borough of *Hastings* may be exercised by the same person? and if not, 2dly, whether the objection goes to the plaintiff's ineligibility at the time of election, or to the incompatibility of holding the two offices together? 1st. I shall contend that they may be exercised together. The same person may hold a judicial and ministerial office, dependent one on the other at the same time, particularly in such a court as the borough court of *Hastings*, where every individual jurat is not bound to act as a judge. It appears from several cases that the judge of a court may act at the same time in a ministerial capacity in that court for some purposes. The case of *Crane v. Holland* (a) was where a writ of error was brought on a judgment from the court of *Northampton*, because the court was held before the mayor and two bailiffs, and the *venire* was awarded to the bailiffs to return the jury before the mayor and bailiffs; but the court held that it

(a) *Cra. Car.* 138. *Sir Wm. Jones* 193. S. C.

might be good by custom, because the bailiffs were not the only judges, but the *mayor* and bailiffs; and one may be judge and officer *diversis respectibus*. There is another case to the same effect of *Gabriel v. Clarke* (a). That was an action on 23 H. 6. c. 9. against the defendant, who was gaoler and mayor, for refusing to take sufficient bail. A former action had been brought in the court of *Nottingham* before the defendant, who had been mayor, and the two bailiffs; and it was moved in arrest of judgment that the sureties were not to be offered before the mayor, but the serjeant; for the mayor was the judge to award the process, and could not be an officer to himself to take the bail: but the court held that although the mayor was judge in some respects, yet that he might also be an officer for keeping the gaol; and he was not the only judge, for the sheriffs also were judges. In like manner, in the ancient proceedings in replevin the writ was directed to the sheriff, who so far was considered as a ministerial officer, and yet while presiding in his court he sat as a judge. But however the case may be where the party must necessarily act in both capacities in the same court, yet, at any rate, where he is not the *sole* judge, it is clear that he may act in a ministerial capacity, because none of the inconveniences to be apprehended in the other case can ensue. In the *King v. Sir Wm. Trelawney* (b), it was also held that the offices of steward and capital burghers of *West Loe* were compatible. There an information in the nature of a *quo warranto* was moved for against the defendant for acting as a capital burghers, having been steward, which was alleged to be a higher office, at the time of his election to the office of capital burghers; the court there refused the application, observing that the offices had been held together for 100 years back, and that they were not incompatible. So in this instance, these offices are stated to have been heretofore held together, which was a circumstance much relied on in that case. The situation of the clerk of assize and the clerk of arraigns is something similar to that of the present plaintiff: they act as officers of the court, and are subject to its control; but their names are, nevertheless, always inserted in the commissions of Oyer and Terminer, in which they are considered as judges; only it is necessary for them to sit with one of the coif. [The court observed, that there never had been any

1787.

MILWARD
against
THATCHER.(a) *Cro. Eliz.* 76.(b) 3 *Burr.* 1615.

instance

1787.

MILWARD
against
THATCHER.

instance of their acting under the commission; and that the clerks had no authority whatever to decide upon any question.] The only case where this point has expressly arisen is *Verriar v. the mayor of Sandwich* (a); but there was no determination on the subject. In *Dy. 332 b*, in the marginal notes, a case is stated to this effect, that one *Baston*, who was town clerk of *B.* was elected alderman without his consent in order to turn him out of his former office, they being incompatible: and thereupon he prayed a writ of restitution to the office of town clerk, which was granted. Now though it is there said that the election to the office of alderman was with a view to put him out of his office of town clerk, yet it does not appear that he was actually put out thereby; nor did the court decide at all upon that point: and besides that is only a marginal note. [*Buller, J.* The marginal notes in *Dyer* are good authority; they were written by Lord Chief Justice *Treby*.] At all events the distinction seems to be that in those cases only where the judicial and ministerial offices must necessarily be exercised at the same time, there they are incompatible. Here it is not necessary that the plaintiff should ever act in his capacity of jurat, there being many other persons of the same description in the borough, and any two are sufficient to make a court. And so it is said in the case of *Sir William Trelawney* (b) by Lord *Mansfield*, that if the party should be chosen mayor, it might then be a question whether his acceptance of *that* office would not vacate his office of steward. Now that distinction could only be upon the principle that then the same person must necessarily exercise a judicial and ministerial office at the same time. But

2dly. If the two offices cannot be held by the same person at the same time, the acceptance of the latter office vacates the former. This appears from the case last cited, where Lord *Mansfield* said, that it seemed to him very strong that, if the two offices were incompatible, the acceptance of the latter would imply a surrender of the former.

Adam, for the defendant, contended that the plaintiff's election to the office of town clerk was void. It is inconsistent that two such offices should be exercised at once by the same person; one of these being a judicial and the other a ministerial office in the same court. He is subject in one of his capacities to his own control in the other, which is a gross absurdity. While

(a) 1 *Sid.* 305.(b) 3 *Burr.* 1616.

fitting as judge, questions might arise touching the propriety of his own conduct as town clerk; and as the jurats have a right to fine the town clerk for his misconduct, he would then have a deliberating voice upon the propriety or extent of the fine to be imposed upon himself. These offices are as inconsistent as if a judge of this court were also to hold the office of one of the clerks, excepting as to the difference of the dignity of the two situations. If then the offices be incompatible, it appears from all the cases that the inferior is avoided by the superior one. As, if a forester by patent for life be made justice in eyre of the same forest, *pro hac vice* the office of forester will be void, 4 *Inst.* 310. So if the warden of the forest be made justice in eyre. So if a justice of *C. B.* be appointed a justice of *B. R.*, the former, being the inferior office, becomes void; and there is no occasion for the former patent to be repealed. *Dyer*, 159. This was *Dyer's* own case. *Cro. Car.* 127. is to the same effect. If a town clerk be made an alderman, the office of town clerk is thereby vacated. *Dy.* 332. There indeed *Baston*, being town clerk of *B.*, was chosen alderman in order to turn him out of his office of town clerk; but because the election to the latter was fraudulent and against his will, he prayed restitution of the office of town clerk, and had it. The same case is also cited in *Popham* 176, and *Noy* 78. The principle there established is, that if it had been a *bonâ fide* voluntary election, it would have been good so as to have avoided the former office. The case of the *King v. Godwin* (a) is decisive; for it was there expressly determined that, when two offices are incompatible, the acceptance of the higher *ipso facto* vacates the inferior office. It is true indeed, that in all these cases the person has been appointed from an inferior to a superior office: but here his ineligibility attaches on account of his being already in possession of the superior office, and the second election is absolutely null and void. As to the case of *Crane v. Holland* (b), there was a custom to warrant the holding of the two offices together; so in the case of the *King v. Sir William Trelawney*; but here there is no such custom stated. In *Gabriel v. Clerke* (c), the two offices of mayor and gaoler might well be held together, because they were not to be exercised together at the same time, or in the same place; and the case in *Siderfin*, as far as it goes, is an authority

1787.

MILWARD
against
THATCHER.(a) *Dougl.* 382. n. 22.(b) *Cro. Car.* 138.(c) *Cro. Eliz.* 76.

1787.

MILWARD
against
THATCHER.

in point against the plaintiff, though the question was not directly determined.

Shepherd, in reply.—With respect to the case of the forester, both the offices, if tenable together, must have been exercised by the same individual, and one officer must have the control over the other, for one sits to correct the errors of the other. So likewise in the instance of a judge of the court of Common Pleas being appointed a judge of this court; for part of the duty of the latter is to correct the errors of the former: besides, when the judges are appointed to sit in this court, they must all act, which is not the case of the jurats of *Hastings*; and that indeed is one reason why a Remembrancer of the Exchequer cannot be a Baron of that court, or a Prothonotary of the court of Common Pleas. But where the offices do not necessarily interfere, as in the case of the Chancellor and the Chief Justice of the King's Bench, they may be held together, as was done by Lord *Hardwicke*. It is no answer to the cases of *Crane v. Holland*, and *R. v. Trelawney*, to say that there had been a custom to warrant the holding of the two offices together; for if it be illegal, no custom could make it otherwise. No custom, which is contrary to the principles of law, can be good, though sanctified by usage for a number of years. But if custom can have any weight in these cases, there are several instances in the borough of *Hastings* of these two offices having been held together by the same person. There is no case in which it has been determined that a superior office necessarily avoids an inferior one, if the officer be first appointed to the former: but it has been decided by all the authorities upon the subject, that, if two offices be incompatible, the acceptance of the latter vacates the former.

ASHHURST, J.—It is not necessary for us to decide in this case whether these two offices are or are not incompatible, because if they are incompatible the acceptance of the latter vacates the former; though, if it were necessary to decide that question, I should be of opinion that they were incompatible, because the one is a ministerial and the other a judicial office. It has been said that the plaintiff is not bound to sit in his judicial capacity, because there is a sufficient number of jurats to constitute a court without him: but there may be cases in which it would be absolutely necessary for him to sit in that character, as in case of the sickness of the other members; and if there be one possible
case

case in which he might be called upon to act, that is an answer to the argument. But on the other part of the case, I think that the acceptance of the latter does absolutely and *ipso facto* avoid the former, although the superior, office, if they be incompatible. It is argued that, when two offices are incompatible, the acceptance of a superior office vacates the inferior one, but that the converse of that proposition does not hold: but I see no reason for the distinction, and I know of no case to warrant it; for if a person chooses to relinquish a superior office on account of the profits of an inferior one, he is at liberty to do so. Now it is stated in this case that the plaintiff has acted as town clerk since his election, and not as jurat; therefore he has accepted the latter office; and, though the former was a superior office, it is vacated by such acceptance.

BULLER, J.—Whether these offices be incompatible or not, there must be judgment for the plaintiff upon this case. This is an issue to try whether the plaintiff was duly elected to the office of town clerk. Now if the offices be compatible, his being a jurat before is no objection to his election; and if they be incompatible, the election to the latter office is good, because the acceptance of the second vacates the first office; therefore he is entitled to this office. The argument in favor of the plaintiff's holding both offices is drawn from several cases which do not bear the least analogy to the present. The cases cited from *Cro. Car.* *Cro. Eliz.* and *Sir W. Jones*, are cases of writs of error brought in civil actions, and the objection was taken to the competency of the judges below: but in such cases the question whether they are properly judges or not can never be determined; it is sufficient if they be judges *de facto*. Suppose a person was even criminally convicted in a court of record, and the recorder of such court was not duly elected, the conviction would still be good in law, he being the judge *de facto*. With respect to the case put of replevin before the sheriff, that depends on an act of parliament. The case of the *King v. Sir W. Trelawney*, as far as the question was entered into, is an authority. There the court did not distinguish between a superior and an inferior office, but Lord *Mansfield* expressly said, that “if the two offices “were incompatible, the acceptance of the latter would imply “a surrender of the former.” That was an application for an information in the nature of a *quo warranto*, in which cases the court exercise a discretion whether they will grant the applica-

1787.

MILWARD
against
THATCHER

1787.

MILWARD
against
HATCHER.

tion or not. There the persons who applied for the information had all been acting under an usage for 100 years before; and it is a decisive answer to such applications, that, where the parties have been acting under an usage, the court will not suffer them to object to it. As to the case in *Dyer*, the party was elected to the office of alderman against his consent; but it is not in the power of any man or description of men to turn any person out of his office by electing him to another against his consent. That case, as far as it goes, likewise shews that these two offices are not compatible. With regard to the distinction which was attempted to be made between being elected from an inferior to a superior office, and from a superior to an inferior office, there is no case to authorise it. Then as to any option which the party may be said to have, there cannot be a stronger instance of having made an option than the plaintiff's accepting the office of town clerk, and acting under it. I have no doubt but that his intention was to keep both offices: but if he is mistaken in law, and chooses to accept the last office, he must abide by the consequences; for it is his own act. It is no argument for the plaintiff to say that he need not act in both capacities at the same time; for in questions of this sort it is material to consider what is the constitution of the borough, and whether by prescription or charter is the same thing; as, if the King by his charter says that there shall be a mayor, twenty-four jurats, and a town clerk, the corporation cannot by their own act reduce the number by consolidating two of these offices. If the two offices be incompatible, the acceptance of the former vacates the latter; nor is this affected by the finding of the jury that the plaintiff was and still is a jurat; for they only state the fact, and the law is still left open.

GROSE, J.—The question stated on this record is whether the plaintiff was duly elected to the office of town clerk: if he was, he must have judgment. Now if these two offices are not incompatible, there is no objection to his election: but if they are, then the question is, whether he was ineligible to the latter office; that is, whether a superior officer is ineligible to an inferior office. Nothing is said in the charter that a jurat shall be ineligible to the office of town clerk; and no cases have decided that he is. If therefore he is not ineligible either by the constitution of the borough or by the common law, whatever effect it may have, he was at any rate elected to the latter office; and

and I think that the fact of his accepting the latter office will probably be considered as a resignation of the former. But it is not necessary to determine that question upon this record. No case has been cited to shew that in point of law a superior officer cannot accept an inferior office; and in point of fact I know of many such instances.

1787.

MILWARD
against
THATCHER.

Let the *Postea* be delivered to the plaintiff.

The KING against EATON.

Tuesday,
Nov. 13th.

BALDWIN moved for a *certiorari* to remove a conviction by a justice of the peace upon the statute 16 Geo. 3. c. 30. which was passed to prevent the stealing of deer.

A *certiorari* lies to remove a conviction on 16 Geo. 3. c. 30. if the defendant has not appealed to the quarter sessions.

Erskine objected, first, that no *certiorari* lay; for by the 23d section it is enacted that no conviction or judgment should be removed by *certiorari*. But

A *certiorari* is granted of course on the application of the crown; but not so where a defendant applies; but he must lay some ground for it before the court, supported by affidavit.

The Court were of opinion, that the result of the several provisions in the act was that the defendant had an option either to remove the proceedings from before the justice convicting by *certiorari*, or to appeal to the quarter sessions; that if he had adopted the latter mode, the *certiorari* would have been barred, but not in the former case.

Erskine then objected that the defendant ought to lay a ground by affidavit before the court granted a *certiorari*, as that the justice convicting had exceeded his jurisdiction, or had not examined the defendant's witnesses, or the like; for if every defendant were at liberty to remove a conviction of course, this great inconvenience would result from it, that every conviction before a justice would be removed by *certiorari* into this court merely to delay the sentence, and the magistrate who had only done his duty would be put to great vexation and expence; and he cited the *King v. Abbott*, Dougl. 534. n. 113. To this it was answered by

Baldwin, that the practice of the court had always been to grant a *certiorari* of course upon the application of either party; and that this objection had never been raised before.

BULLER, J.—The language of the court has always been, that the King has a right to remove proceedings by *certiorari* of course; but that where a defendant makes an application of this

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1787.

The KING
against
KATON.

fort, he must always lay a ground for it before the court. Lord *Mansfield* has laid down this distinction again and again, that on the part of the crown it is a matter of course for the court to grant it, but that it is not a matter of course on the part of the defendant. Now if it be not a matter of course to grant such an application as this, it can only be obtained by laying a ground by affidavit: a slight ground indeed may be sufficient, but there must be some, or else what is the consequence? we should have to decide upon every conviction in the kingdom, which would be removed into this court.

The two other Judges concurred in this opinion. Whereupon.

Baldwin offered an affidavit of the merits, which being read, the rule was made absolute for a *certiorari*.

BULLER, J.—on a subsequent day, said that upon further enquiry into the cases, it appeared most clearly that the opinion of the court before delivered in this case was correctly proper, and that the practice had not been such as *Baldwin* had suggested. That the rule requiring the defendant to lay a ground before the court for granting a *certiorari* had obtained since the time of *Charles 2.* That it appeared from a case in *Sir Edward Northey's* notes, *M. 25 Car. 2.* that it was then held as clear law that a *certiorari* ought not to be granted in vacation, but in open court, and upon a ground shewn. And even in the case of the *King* and *Abbott* it was admitted by the counsel who argued for the granting of the *certiorari*, that it could not be granted without shewing some ground to the court.

Wednesday,
Nov. 14th.

The KING against W. JOLLIFFE.

If *A.* has an exclusive right of using a way-leave over land which he holds in common with *B.*

paying *B.* a certain sum yearly, and has the privilege of using a way-leave occupied by *C.* paying him so much *per ton* for the goods carried over it, *A.* is not liable to be rated to the relief of the poor in respect of either of such way-leaves.—2. Whether the owner of the land, who receives a profit for such way-leave, is not liable to be rated for such an increase of value?

in

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

91

in *Waldridge* to the river *Wear*, and there lodging the same in his staith till they are put into keels or lighters, and carried down the said river to the port of *Sunderland* in the said county, to be there put on ship-board, at the yearly rent in the whole of 752*l.* 4*s.* being the amount of what he paid annually for such way-leaves or liberties of passage to the several owners of the lands through which the same way-leaves or liberties of passage are granted. On appeal the Sessions at *Durham* confirmed the rate, and stated the following case for the opinion of this court.

1787.

The KING
against
JOLLIFFE.

The appellant is the proprietor and worker of certain coal-mines and collieries in the township of *Waldridge*, in the parish of *Chester-le-Street*, in the county of *Durham*, which have been won by him and wrought for above five years last past. For the purpose of exporting the coals won and wrought out of the said coal-mines and collieries, and vending the same by water sale, the defendant contracted with *R. Milbanke*, Esq. who is tenant in common with himself, and others, whose respective grounds lie between the said collieries and the river *Wear*, for certain way-leaves or liberties of passage for leading coals with coal waggons or otherwise, and of making and laying waggon ways in and through their lands and grounds in the most convenient direction to or towards the river, for a certain term of years, at and under certain yearly rents or payments, and upon certain conditions stipulated and agreed upon. In pursuance of those contracts, the defendant obtained leases from those several persons of such way-leaves, and liberty of making and laying waggon ways in and through the lands and grounds of the said lessors respectively [*prout* the said several leases]. The appellant hath not made or laid any waggon way in, through, over, or along any lands or grounds in the said township belonging to any of the said lessors; but he made and laid and now uses a waggon way upon a small part of the lands and grounds in the same township, of which he is tenant in common with the said *Ralph Milbanke*. And Sir *John Eden*, Bart. having several years prior to the granting of the said leases laid and made a waggon way through and along the said lands and grounds of the said lessors for the use of his colliery at *Beamish* in the said county, by virtue of certain leases similar in point of general form to those herein before mentioned and referred to above, the appellant, with their consent, agreed with the said Sir *John Eden* for the

1787.

The KING
against
JOLLIFFE.

the use of his said waggon way for conveying the coals of the said *Waldridge* colliery to the river *Wear*, paying to the said Sir *John Eden* a certain sum of money for every ton of coals he the appellant should cause to be carried along the said way, for and towards the making and repairing of the same. Sir *John Eden* enjoyed and used the said waggon way for several years, without being rated to the poor for or in respect of the same; but he hath been rated according to the rents he pays for the said way-leaves demised to him, and hath paid the money rated or charged upon him for these three years last past and upwards. Some parts of the waggon ways, made by the said Sir *John Eden*, and over and along which he and the said appellant lead and carry their respective coals as aforesaid, are fenced on both sides off and from several fields or inclosures through which they pass, and other parts of the said waggon ways lie open to those fields or inclosures.

A rule was obtained last term to shew cause why the order of sessions should not be quashed. This matter was argued last term by *Chambre*, against the rule, and *Lawrence*, Serjeant, in support of it, when the court (a) were of opinion against the defendant. But entertaining a doubt upon the question, the next day they ordered a second argument.

Law, against the rule, now contended first, that the defendant was liable to be rated to the relief of the poor under the 43 *Eliz. c. 2.* as an occupier of land; or secondly, that he was chargeable as for an incorporeal hereditament. First, as to part of this land, which he holds as tenant in common with *Milbanke*, and of which by a contract with *Milbanke* he has the separate use for his waggon way, he is undoubtedly the occupier. With respect to the other part he has occupied a waggon way in common with Sir *J. Eden*, who has a similar right under similar leases. The defendant has a right of using this land in a manner incompatible with any other mode of enjoying it, and which is almost equal to the absolute dominion over it; for he has a right to affix a framed waggon way over it, to alter its level, to make drains, bridges, &c. It is laid down in *Co. Lit. 4. b.* that by a grant of a boillery of salt, the land itself passes; for it is the whole profit of the soil; and the grant of the profits of the soil is a grant of the soil itself. Now here no profits remain which are not granted to the lessees of this waggon way; for the waggon

(a) *Ashurst, J. and Grose, J.*

way precludes the enjoyment of the land in any other shape. The leases referred to in the case granted to the defendant not only a right of passage, but also the soil and ground over which any passage should be made. [*Per Curiam*. The defendant never made a waggon way under the power reserved to him in the leases, and consequently has not the soil over which such way would have gone.] But though this way never was actually laid down by him, it is to be observed that the right was in him, and he virtually exercised and enjoyed that right in another place. It is like the moveable fee-simple, of which Lord Coke speaks, where a distinct portion of lands belonging to several persons was annually assigned to each, and even such lands so moveable he held might be parcel of a manor. Here the defendant takes his moveable interest in the soil in common with another, instead of separately by himself. It may be said that Sir J. Eden, is rated for the land in question: but he can only be rated as one tenant in common may be for his joint occupation of land, which does not exempt the others from a rate. The occupiers of a cattlegate, which is a mere tenancy in common of pasture ground, may be rated severally. So in the case of a fee-simple moveable, if two persons, instead of taking several allotments, choose to have two allotments jointly, which may be equally beneficial to them, each may be rated for his own part. Thus the defendant has an exclusive enjoyment in one part, and an enjoyment as tenant in common in another part of the land over which the way-leave is laid. Secondly, If this be considered as an incorporeal hereditament, it is equally an object of taxation under the 43 Eliz. Tithes are expressly so: and though the *expressio unius*, coal mines, has been held to be *exclusio alterius*, lead mines; yet that only applies where the *alter* is of the same kind. If it be said that an ejectment will not lie for a way-leave; it does not follow therefore that the property is not rateable; for an ejectment will not lie for tolls, and yet tolls are held rateable. 3 Keb. 540. Cowp. 581. Dougl. 292. This is not like the case of the light-house tolls at Harwich (a); there the tolls were not locally situated within the parish: Besides they were appropriated as a sort of salary out of duties before payable to the crown. In the case of the King v. Hogg (b) the profits depended upon the use of a moveable machine

1787.

The KING
against
JOLLIFFE.

(a) Binn. 384.

(b) Anté, 1 vol. 721.

1787.

The KING
against
JOLLIFFE.

resting upon the floor of an house by which it was inclosed: and every argument which could be urged in support of that case is equally applicable here; the profits are permanent and local. And this cannot be compared to the case of a quit-rent, as it is not stated that the owner of the land is liable. But at all events this rule must be discharged, because the defendant is liable to be rated for that part of the road before the junction with Sir J. Eden's grounds: and this is an appeal against the whole rate, and if any part of the subject in question be rateable, the defendant cannot succeed here; the quantum of the rate is for the determination of the sessions.

Erskine, in support of the rule, was stopped by the court.

ASHHURST, J.—It cannot be said on this state of the case that the defendant was an *occupier* of any thing; for all that he has is a concurrent right given him by Sir J. Eden of making use of this way-leave at so much *per ton* for all the coals that he should carry, which is nothing more than a purchase of the liberty of carrying every ton of coals. Sir J. Eden having himself only the way-leave, he could not lease that right to any other without the consent of the owners of the land. And whether in Sir J. Eden's leases the soil did or did not pass, at all events it did not pass to the defendant. He had only the liberty of using the waggon way; and whatever might be the case with respect to Sir J. Eden, concerning whose right it is not necessary to give any opinion now, this defendant has only a bare licence, and in respect of such licence he is not liable to be rated.

BULLER, J.—This question will depend on considering the nature of the right which the defendant has. This is only a bare right of passage, which is an easement, and not a grant of the profits of the land. And it is admitted that if it be only an easement, it is not the subject of a rate. One of the leases referred to in the case seems to be drawn in a very strange manner: The general purpose of it is to grant to the defendant a right of way, but it contains a clause which conveys the soil under certain terms. But the facts which are stated in this case lay that part of the lease out of the question; for the soil is granted in such parts only where the defendant shall make a way, and as he has never made any way, he cannot have the soil. With respect to every thing else which is granted to the defendant under these leases, it is a mere right of passage; and if he were rated for that, it would be a double rate. In the case of the tolls, it is not he who

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pays, but he who receives, the toll, that is rated. This is not like the case of a grant of land to be used in a manner incompatible with any other mode of enjoying it; for the defendant has only the liberty of passing over this land for the purpose of carrying his coals, and cannot prevent any other person from using it. And if grass were to grow on this way the owner of the land would have a right to feed his cattle on it: The easement which the defendant has does not affect the right of the owner of the land. Great inconveniences would result from rating every way-leave; for if a neighbour were to give a right of passing over his field merely out of friendship, and no rent were paid for it, such liberty of passage would not be the subject of a rate, because the land can only be rated in the hands of the occupier; but if he were to make an advantage of it, as such it may be rated in his hands.

GROSE, J.—I am glad that this case has been argued a second time: since the former argument I have thought a great deal upon the subject, and I am now convinced that I was mistaken in the opinion which I at first formed. After considering all the cases, and the inconvenience which would attend a contrary determination, I am clearly of opinion that a mere easement cannot be rated. But whether this way is rateable or not, there is no doubt but that the *occupier* must be rated, and that the same thing cannot be *twice rated*. In order to support this rate, the defendant must be rated either for the way, or the land over which the way passes. But he cannot be rated for the latter, because the land must have been before rated in the hands of the occupier of that land. Neither is he liable to be rated for the former, because it is positively stated that he never made the waggon ways which he had the power of doing under the leases; but by the consent of Sir J. Eden he has used those way-leaves which Sir J. Eden had made. And if any person could be rated for these way-leaves, it would be Sir J. Eden.

Order of sessions quashed.

1787.

The KING
against
JOLLIFFE.

The

1787.

Wednesday
Nov. 14th.

The KING against DIMPSEY.

The Same against POTTS, SOFTLEY, and WOOD.

Where justices of the peace are required by a penal statute to distribute the penalty on conviction among certain persons according to their discretion, an adjudication that the forfeiture be disposed of as the law directs is bad, and the court will quash the conviction. The justice ought to have adjudged what the several proportions should be.

THESE defendants were severally convicted before three justices upon 26 Geo. 3. c. 10. for refusing to receive soldiers regularly quartered and billeted upon them. These convictions were removed here by *certiorari* for the purpose of taking the opinion of the court upon the construction of the mutiny act, whether ale-house-keepers are bound to take in horses as well as soldiers. But as there was a decisive objection to the form of the convictions, the general question was not discussed. Each of the convictions concluded as follows, "and we do adjudge that for the offence aforesaid he the said defendant hath forfeited the sum of 5*l.* of lawful money of Great Britain, to be disposed of as the law directs."

Law objected that there was no distribution of the penalty by the justices. The penalty is directed (a) to be applied in the first place to make satisfaction to the soldier for any expence he may have been put to by reason of his not being billeted as the justices shall direct, and the remainder is to be paid to the overseers of the poor of the parish. He admitted that where the statute distributes the penalty in certain proportions, as in the *Queen against Barret* (b), where 10*l.* was given to the party grieved, and 10*l.* to the poor, the penalty need not be distributed by the justices in the conviction: but where it is discretionary in the justices, as in the present instance, to distribute the penalty in such proportions as they shall direct, that distribution must appear upon the conviction itself.

Erskine, contra. The justices were not bound to set forth in the conviction the manner in which they have exercised their discretion as to the distribution of the penalty. At the time of the conviction the penalty is not levied, and *non constat* that it ever will; so that it is impossible to distribute it till it is raised. It may be done at a subsequent time, and the court will not presume that the justices will not do their duty.

(a) S. 66.

(b) Salk. 383.

Per Curiam. A judgment is an entire thing; and one part of it cannot be given at one time and another at a subsequent period. The distribution of the penalty is part of the judgment, and it ought to appear on the record.

Conviction quashed.

1787.

The King
against
DIMPSEY.

PADGET and Another against PRIEST and PORTER.

Thursday,
Nov. 15th.

CASE for goods sold and delivered against the defendants as executors of *W. Shore*. They severally pleaded the general issue; that they were not executors; and that they had fully administered. At the trial of this cause before *Buller, J.* at the Sittings at *Westminster* after last term, the plaintiffs proved the delivery of the goods in question to *W. Shore*, who was a publican. A few days previous to his death the intestate sent to *Porter* his brewer, desiring him to send a man to take charge of the cellar, and to draw the beer, who sent *Payne* his servant. *Payne* sold beer as well after the intestate's death as before. The intestate likewise ordered *Payne* to sell some hogs, which he did after his death, and paid into *Porter's* hands the produce of them and of the beer which was sold after the death of *Shore*. On the 7th of *December* 1786 administration was granted to *J. Shore*, who afterwards brought actions against these defendants for money had and received. On the 3d of *February* last, *Priest* paid 8*l.* and on the 10th *February* *Porter* paid 41*l.* into court, in those actions. On the 31st *January* the defendants pleaded in this action, which had been commenced on 23d *December* preceding. Verdict for the plaintiffs.

Palmer had obtained a rule on a former day to shew cause why there should not be a new trial, because there was no evidence to prove the defendants executors *de son tort*, or at most only flight evidence of facts done by them, which ought to have been left to the jury to consider with what view they had acted; and that at all events there was no evidence to affect *Priest*.

BULLER, J.—after reporting the above facts, now said that considering *Priest* merely in the light of a servant, he should have been desirous of obtaining a verdict in his favor, if that could have been done consistently with the evidence; but in fact he had paid money into court in another action brought against him by the administrator, which was decisive against him.

If *A.* the servant of *B.* sell the goods of *C.* an intestate, as well after his death as before, though by the orders of *C.* and pay the money arising therefrom into the hands of *B.* *B.* may be sued as an executor *de son tort*.

If a person has money belonging to an intestate in his hands at the time when an action is brought against him as executor for a debt due from the intestate, he is liable as an executor *de son tort*.

What acts make a person liable as executor *de son tort* is a matter of law for the judge to decide; It is for the jury to say whether the acts are sufficiently proved.

1787.

PADGET
against
PRIEST.

Mingay was to have shewn cause, but *Palmer* was desired to begin. With respect to *Priest*, there was no evidence against him; unless in all actions where money, which belonged to an intestate, has been once recovered against any person, you may afterwards recover against the same person as executor *de son tort*. What was done by *Porter* under the circumstances of this case cannot make him an executor *de son tort*. *Godolphin* (a) enumerates the different acts by which a person may become an executor *de son tort*: but this does not fall within the description of any one of them. For *Porter* did not officiously intermeddle with the intestate's effects; he only acted under the directions of the intestate; and it should have been left to the jury to consider with what view and in what character he acted. He admitted that *Payne* had made himself an executor *de son tort* by paying the money over to *Porter*, who was only liable to the rightful administrator in an action for money had and received. This is not like one of the instances put in *Read's* case (b) of intermeddling as a stranger, but that of a person who was retained in an employment by the intestate himself, and who only continued it after his death as a necessary mode of carrying on the business for the benefit of the intestate's estate. If *Porter* can be charged as an executor *de son tort*, every bailiff of a farm, and every shopman of a tradesman, who continued the business of his principal after his decease, would be equally held liable. These acts therefore should have been left to the jury to decide *quo animo* they were done. But even supposing that these acts can be construed to make him an executor *de son tort*, yet the rightful administrator had his election either to sue him as executor, or to bring an action for money had and received to his use: and by adopting the latter mode he affirmed the acts of the defendants, who must now be taken to have acted under his directions. *Omnis ratihabitio retro trahitur & mandato æquiparatur*. He cannot affirm and disaffirm the same transactions. If a bastard *ei*gn^e enter and remain in possession till his death, his heir cannot be turned out by the *mulier pui*sn^e. But if the entry be made during the life of the *mulier*, that avoids the estate of the bastard. And Lord *Coke* (c) says, that if a stranger enter in the name of the *mulier*, though without his authority, and his act be afterwards con-

(a) Page 91.

(b) 5 Co. 33.

(c) Co. Lit. 245. a.

fined by the *mulier* before the descent of the bastard, the claim will be good as against the *eigne*. So that the act of a stranger, which is at first merely officious, may become lawful by a ratification of the person entitled. So if a stranger enter to avoid a fine, and it be confirmed within the five years by the person having right (a). So if a stranger in the name of the mortgagor tender the money, and the mortgagee accept it, it is a good satisfaction, and the mortgagor agreeing thereto may re-enter (b). Now in the present case an action was brought by the lawful administrator against the defendants for money had and received by them to his use. This was an election by him to consider their acts as done on his account. And as the possession of the intestate's effects is vested in the administrator by relation from the time of his death, it would be absurd to say that he could not affirm any thing done in order to preserve the assets in the intermediate time. Therefore on the plea of *ne unques executor* the defendants were entitled either to a verdict or to a strong direction from the judge to the jury in their favor.

ASHHURST, J.—It is very clear upon the evidence that the money in the hands of the defendants belonging to the intestate was not paid over to the rightful administrator when this action was brought; and therefore they cannot justify it under any plea. Though they might have excused themselves by paying the money over before action brought, yet not having done so they have made themselves executors *de son tort*.

BULLER, J.—The plaintiffs, who were creditors of *W. Shore*, find *Priest* and *Porter* selling his goods; and as they had no means of knowing whether they were lawful or wrongful executors, they looked upon them from their acts in the character of rightful executors. They therefore brought this action against them as executors; they proved effects of the intestate in their hands; that they sold them after the intestate's death; and that at the time when this action was brought, and even when the defendants pleaded in this action, they had money of the intestate in their hands. I cannot agree with the defendants' counsel that the question whether executors *de son tort* or not is to be left to a jury; that is a conclusion of law; whether the defendants had effects belonging to the intestate or not, and whether they sold them, were indeed questions to be left to a jury: but when those facts are established, the result from them is a

1787.

PADGET
against
PRIEST.(a) *Co. Lit.* 245. a.(b) *Co. Lit.* 207. a.

question

1787.

PADGET
against
PRIEST.

question of law; and it is clear from all the cases that the slightest circumstance will make a man an executor *de son tort*. It is said in *Dyer* 166. *b.* that if a man even milk the cows, or take a dog, of the intestate, that will constitute him an executor *de son tort*. With respect to *Porter*, it clearly appears from the evidence that he meant to pay himself by intermeddling with the intestate's affairs: but as to *Priest* if there had been any circumstances in his favor, I would have left it to the jury to find for him. But I could not do so when it appeared that at the time of plea pleaded he had money of the intestate's in his hands. With regard to the rule of the wrongful acts of the stranger being purged by the subsequent assent of the rightful administrator, that cannot apply to the case of third persons; it only applies to the acts of the administrator himself. If indeed, previously to an action brought against the defendants as executors *de son tort* they had paid the money over to the rightful administrator, that would have been a good defence; because then they would have applied the money properly. So that the courts have gone thus far, that if an action be brought by a rightful administrator against an executor *de son tort*, whatever may have been disposed of in the course of administration, as by paying debts, &c. shall be allowed to him in damages. But that does not apply to this case, where the creditors find money in the hands of the defendants at the time of bringing the action.

GROSE, J.—Of the same opinion.

Rule discharged.

Friday,
Nov. 16th.

TOUSSAINT and Others *against* MARTINNANT.

If a surety bound with his principal for payment of money by instalments take a bond from the principal conditioned for payment of the amount of the instalments before

the first of them will be due, and before that time the principal becomes bankrupt and obtains his certificate, and afterwards the instalment bond is discharged by the surety, still he cannot maintain an action against the principal for money paid to his use.

CASE for money paid, laid out, and expended, money lent and advanced, money had and received, and upon an account stated. Pleas, 1st. *Non assumpsit*. 2dly, That the defendant became a bankrupt on the 11th *February* 1785, and that the causes of action accrued to the plaintiffs before. At the trial at the last *Westminster* Sittings, before *Buller*, J. the jury found a verdict for the plaintiffs, damages 1200 *l.* subject to the opinion of the court on the following case.

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The defendant, having borrowed several sums of money amounting to 1500*l.* from different persons, prevailed on the plaintiffs on the 8th of *November* 1783 to execute jointly with him several bonds of this date to the persons advancing the money, and thereby to become jointly and severally bound with him for the payment of the principal and interest by instalments, the first of which was to become due on the 8th of *March* 1786. The defendant by bond of the same date, 8th *November* 1783, became bound to the plaintiffs in 3000*l.* with a condition for the payment of 1500*l.* with interest on the 8th of *February* 1784, and gave them a warrant of attorney to enter up judgment thereupon; which bond and warrant of attorney were given by the defendant to the plaintiffs to secure to them the payment of the 1500*l.* and interest, for which they had so become engaged as aforesaid. On the 13th of *August* 1784 the plaintiffs signed judgment against the defendant for 3000*l.* debt, and 63*l.* costs, by virtue of the said warrant; and on the 29th of *November* 1784 sued out a writ of *feri facias* returnable on the 24th day of *January* 1785, upon which the goods of the defendant to the amount of 1050*l.* were taken. On the 2d of *December* 1784 a commission of bankrupt issued against the defendant, and he was thereupon declared to have committed an act of bankruptcy. On the 31st of *May* 1785 the defendant obtained his certificate. Soon after the issuing of this commission the assignees claimed the effects taken under the execution, and the sheriffs, indemnified by them, delivered to them the goods, and returned *nulla bona* to the said writ of *feri facias*. The obligees in the instalment bonds proved the sums due on their several bonds under the commission against the defendant, and received a dividend of 5*s.* 6*d.* in the pound in respect thereof; and the rest of the principal and interest, secured by these bonds, amounting to 1200*l.* 4*s.* 7*d.* and for which this action was brought, has been paid by the plaintiffs since the date of the defendant's certificate to the said obligees, who thereupon by deed assigned over to them the subsequent dividends. If the court shall be of opinion that the plaintiffs ought not to recover, then a non-suit to be entered.

Haywood contended first that, if the bond and judgment had not been given, the plaintiffs would have been entitled to recover on the general ground; and secondly, that the bond and judgment could not affect the plaintiffs' right, or make any differ-

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1787.

TOUSSAINT
against
MARTIN-
NANT.

1787.

TOUSSAINT
against
MARTIN-
NANT.

ence in the question. As to the first; laying the bond and judgment out of the question, this is like the common case where a surety, having executed a bond jointly with the principal for money to be paid at distant instalments, which become due after the bankruptcy of the principal, pays the money, and then brings his action for money paid against the bankrupt. The debt from the bankrupt to the surety accrues only upon the payment of money, for which he is bound: he is not damnified till after the bankruptcy, and till damnification he has no cause of action. And even where the bond in which the surety has joined has been forfeited *before* bankruptcy, by which a debt in law arises, and where it is perfectly clear that the surety must ultimately pay the debt, no action lies till the money is actually paid, *Taylor v. Mills* and Another, *Cowp.* 525. and *Paul v. Jones*, *ante*, 1 vol. 599. So here there was no debt due to the plaintiffs till they had been called upon for payment of the money, and that not being till *after* the bankruptcy, there was no subsisting debt which could be proved under the commission. Hence the form of this action is not on a contract executory, nor on a promise to indemnify; but on an *indebitatus assumpsit* for the money paid. If it be contended that this bond, being absolute in its form, and payable at a certain day, was forfeited before the bankruptcy, and so might have been proved under the commission; it is to be observed that it is stated in the case that the bond was given "to secure the payment of 1500*l.* &c." and a security for payment of the money, for which a surety has engaged himself, is a security to indemnify. *Heskuyson v. Woodbridge*, *Dougl.* 160, *n.* 55. If then this be a bond of indemnity, the next question is whether it could be proved under the commission? But the plaintiffs could not then swear to any debt being really due and owing; for though there was according to the strict legal acceptance of the words a debt due, yet the bond and judgment were in fact given for payment of money by instalments which had not become due; so that they were really given to secure a sum of money which never might be owing. Neither could the commissioners permit it to be proved, because it was fraudulent as against the general creditors; it would have been an attempt to load the bankrupt's estate with a double dividend for the same debt. No consideration had been paid for it before the bankruptcy; for the consideration ought to be one by which the

the bankrupt's estate receives benefit. And the commissioners have a right to examine into the consideration of all notes, bonds, or judgments, attempted to be proved under the commission. 1 *Atk.* 71, & 222. The mischievous consequences of permitting such debts to be proved might be very serious. It would open a door to great fraud; for a bankrupt by collusion with his favorite creditors might give them a preference in securities to any amount. Suppose a bankrupt could pay 15 s. in the pound, by this double security his surety would be entitled to 30 s. in the pound; and the bankrupt might cheat the honest creditors of one half of his estate. By increasing the securities, this evil might be increased to any extent. On another ground this bond and judgment must be inadmissible by the commissioners; for when they came to enquire into the consideration, it would appear that whether it would ever become a debt or not was an event depending on contingencies; *non constat* that the instalments might not be paid, and the plaintiffs never called upon. Hence it could not be the subject of valuation; for the plaintiffs could not tell whether they should be damnified or not, or to what amount. This makes the great distinction between this case and that of bonds for payment of certain sums by instalments, forfeited before bankruptcy; for those, being conditioned for certain stated payments subsequent to the bankruptcy, are the subject of a valuation; but this, depending on a contingency which may never happen, cannot be valued.

If it be contended that *indebitatus assumpsit* for money paid, laid out and expended, cannot be maintained in this case, it may be answered first, that though this is a bond in a qualified sense, yet its operation is put an end to by the commission; and secondly that at all events it only gave the plaintiffs a concurrent remedy. As to the first, it must be allowed that this was a debt due and owing at law before the commission, and therefore was barred by it, though it could not be proved under it for want of a consideration. Bankruptcy would be a good plea to an action on the bond; for the plaintiffs could not reply that it was given for payment of a sum of money at the day on which they should be obliged to discharge the instalment bond; because that would be to aver against the condition. The same reasoning holds as to the judgment; for if execution had been taken out, the pleadings would have come to the same issue in an *audita querela*. So that this bond and judgment could be a security only up to the

1787.

TOUSSAINT
against
MARTIN-
NANT.

1787.

TOUSSAINT
against
MARTIN-
NANT.

time of the bankruptcy, when an act of law was interposed to destroy its effect; and that being out of the way an *assumpsit* arose, as in the common case upon payment of the money. With respect to the second answer, this bond and judgment could only be a collateral security. The defendant, in order to indemnify the plaintiffs, gave a present debt as a security for one which might possibly exist at a future period: but a bond given for a future debt is no extinguishment or discharge of it. 1 Leon. 154. In *Cotterel v. Hooke*, Dougl. 93. where a bond and also a deed of covenant were given to secure an annuity, though the bond was forfeited before a discharge under the insolvent act of 16 Geo. 3. c. 38. the defendant was held liable to be sued upon the covenant for payments becoming due after the discharge. Here no debt arose till the plaintiffs were damnified, which was not till after the bankruptcy; and that future debt for money paid could not be deraigned by a bond made before the bankruptcy, long before the debt accrued. So that even if the bond and judgment could have been proved under the commission, the dividend could only be a discharge *pro tanto*: and the plaintiffs will be entitled to hold their verdict; for they have a right to recover the 1200*l.* deducting the amount of that dividend.

Wood, for the defendant, was stopped by the court.

ASHHURST, J.—There is no doubt but that wherever a person gives a security, by way of indemnity for another, and pays the money, the law raises an *assumpsit*. But where he will not rely on the promise which the law will raise, but takes a bond as a security, there he has chosen his own remedy, and he cannot resort to an action of *assumpsit*. Therefore in this case his only security is the bond. Possibly if the plaintiffs had recovered upon the bond when it was forfeited, and he was not afterwards damnified by being obliged to pay the instalments, by a bill in equity he might have been compelled to refund all that money which he had received. But at law the penalty of the bond became a legal debt, and as soon as that was forfeited he became a creditor of the bankrupt, and might have proved his debt under the commission. But still the bond was his remedy; and he shall not be permitted to change his security upon a subsequent event, and resort to that indemnity which the law would have raised.

BULLER,

BULLER, J.—In ancient times no action could be maintained at law, where a surety had paid the debt of his principal: and the first case of the kind, in which the plaintiff succeeded, was before *Gould, J. at Dorchester*, which was decided on equitable grounds. Now, why does the law raise such a promise? Because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties: in the present case the plaintiffs have taken a bond, and therefore they must have recourse to that security. It has been objected by the plaintiffs' counsel, that this bond could not be proved under the commission of bankrupt; but there would have been no difficulty in that. First, it is said that there is no consideration for it: but clearly as a question of law there is a sufficient consideration; for the surety binds himself to pay the debt of another, who afterwards becomes a bankrupt; the consideration is therefore good in law. And it is not unreasonable; for the surety may say he will only lend his credit for three months, and if the money is not paid at that time, he will call on the principal for his indemnity. The surety is the effective and responsible man; he is the person to whom the creditor principally looks, and he is taken because the credit of the principal is doubted. There is as little foundation for the other objection, that the bond is fraudulent, because it is made payable before the day on which the first instalment became due. It is not fraudulent against the estate of the bankrupt; for the bankruptcy cannot make any difference in this case. In no event could this circumstance have that effect on the bankrupt's estate which has been suggested. For in the case put a court of equity would undoubtedly give relief. If it were attempted to prove the two bonds under the commission; a court of equity would interpose, and would not suffer more than 20s. in the pound to be paid for the same debt. I do not indeed say by what particular course a court of equity would give relief; one way would be to compel the creditor to make his election to which of the two securities he would resort; or where the whole sum had been proved under one of the bonds, they would compel the party in possession of the other to give it up. But with respect to the form of this action, I am clearly of opinion that it cannot be supported.

GROSE, J.—declared himself of the same opinion.

Judgment of nonsuit to be entered.

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The

1787.

TOUSSAINT
against
MARTIN-
NANT.

1787.

Friday,
Nov. 16th.The KING *against* the Inhabitants of SHEFFIELD.

If the inhabitants of a township, bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish.

THIS was a demurrer to an indictment.

The indictment stated that on the 8th day of *April* next after the making and passing of a certain act of parliament passed in the 19th year, &c. "for repairing and widening the "road from *Gander-lane* in the county of *Derby* to *Sheffield* in "the West Riding of the county of *York*, and also the road "branching out of the said road at or near *Mosbrough Green* in "the said county of *Derby* to *Clown* in the said county," *John Parker*, &c. being sixteen of the trustees appointed by the said act to put the same into execution, at a meeting held, &c. made an order that the road from *Sheffield* to *Woodthorpe Common*, being part of the road by the said act directed to be ordered, altered, widened, turned, and repaired, and part thereof being in *Sheffield Park*, in the same act mentioned, should be forty feet wide, &c. That at another meeting of the trustees, held on the 28th *April*, it was ordered that the footway should be on the west side of the road through *Sheffield Park*, &c. That afterwards, to wit, on the first of *January* 1780, the said road in the said orders mentioned, in such parts thereof as was and is lying in *Sheffield Park*, was, in pursuance of the said orders, made and perfected, and then and there, by virtue of the same orders respectively, and of the said act, became and was and ever since hath been a common public king's highway for all the king's subjects, &c. That afterwards, to wit, on the first of *June* 1785, a certain part of the said common king's highway in *Sheffield Park* (particularly describing it) and continually from that time was and is ruinous and out of repair. And *that the inhabitants of the said parish of Sheffield (except the inhabitants of the township of Sheffield) ought to repair and amend the same when and so often as shall be necessary.* The second count stated that on the first of *June* 1785 there was and yet is a certain common king's highway, leading from the town of *Sheffield* to *Woodthorpe* in the said county of *York* for all the liege subjects, &c; and that a certain part of the same common king's highway, situate and being in *Sheffield Park* (particularly describing it) on the second of *June* 1785, and continually from that time until, &c. was and yet is very ruinous and out of repair. And that the in-

habitants of the parish of Sheffield (except the inhabitants of the township of Sheffield, who are exempted from the repair thereof by virtue of an act of parliament passed in the 19th year, &c.) ought to repair and amend the same when and as often as shall be necessary, &c.

1787.

The KING
against
SHEFFIELD.

Plea, as to the first count, that from time immemorial the inhabitants of the said township of *Sheffield* have repaired, maintained, and amended, and still of right ought to repair, maintain, and amend, all and every the king's highways lying or being within the said township of *Sheffield*, except the highway in the said first count of the said indictment mentioned, when and so often as it hath been or shall be necessary; and that during the time aforesaid no other of the inhabitants of the said parish of *Sheffield*, except the inhabitants of the said township of *Sheffield* ever did or were used to repair or amend any part of the king's common highway within the said township of *Sheffield*. And that the said highway in *Sheffield Park* in the said first count of the indictment mentioned, and thereby supposed to be in decay, was and is a certain highway in the said park, and within the said township of *Sheffield*, newly made and set out by the trustees appointed by the said act for surveying, making, repairing, &c. the said roads in the said act mentioned, and for otherwise putting the said act into execution, under colour of the said act in and through ground lately belonging to the Earl of *Surrey*, and purchased by the said trustees for the purpose of making such highway, where none had been before, and which was so made and set out as a better, nearer, and more commodious, passage from the town of *Sheffield* aforesaid to *Woodthorpe* aforesaid for the king's subjects to pass and repass, &c. than in and through the ancient highways before used for that purpose; which highways so before used for that purpose have from time whereof, &c. been, and been used to be, repaired and amended by the inhabitants of the said township of *Sheffield*, and of other townships respectively, through which the same lay, and not by the inhabitants of the parish of *Sheffield*, except as aforesaid, when and so often as hath been necessary; and this, &c. wherefore, &c. The same plea as the second count. *General demurrers and joinder.*

The indictment having been removed into this court by *certiorari*, the demurrers were argued last Term by *Chambre* in support of them, and *Wood* on the other side; and again this Term by *Law* for the demurrer, and *Bower contra.*

Law

1787.

The KING
against
SHEFFIELD.

Law, in support of the demurrers, contended that since the passing of the act 19 Geo. 3. c. 99. the burthen of repairing the road mentioned in the indictment must necessarily fall upon the rest of the parish at large, exclusive of the township of *Sheffield*. The road in question was made by virtue of that act, which first directs that the highways to be made in pursuance of that act *shall be highways to all intents and purposes, and shall be repaired as such*. If the act had stopped there, the burthen of repairing the road would have fallen on those who by the common law of the land are bound to repair roads where no other persons are substituted in their room by particular custom, namely, the inhabitants of the parish at large. But then the statute proceeds to enact, that the roads newly made shall be repaired by those who were liable before the passing of the act. So that on this part of the act the burthen of repairing would have devolved on the *township*. But then follows a subsequent clause which exempts the *township* of *Sheffield* from the repair of any roads; this therefore throws the burthen back again upon the parish, who are liable at common law. Antecedent to the existence of any usage in discharge of the parish, they were liable in the first instance by the common law. 1 *Ventr.* 183. 9. The discharge therefore from such general burthen must have arisen subsequently. Now if the parish were originally liable, when that discharge which was interposed between them and that liability is withdrawn, the old burthen revives. In 1 Lord *Raym.* 725, Lord Ch. J. *Holt* said, that the inhabitants of every parish of common right ought to repair the highways, and therefore if particular persons are made chargeable with the repairs of the said ways by a statute lately made, and they become insolvent, the justices of peace may put that charge on the rest of the inhabitants. Now that same burthen, which returns to the parish in that case when those persons are *not able to repair* must likewise revert to it *pari ratione* when the same persons are *not liable to repair*. That the inhabitants of a parish generally are liable to these repairs is so clear that an indictment stating that particular persons ought to repair, without averring a special cause for charging them, is bad. 5 *Burr.* 2700. A parish is in the same situation with respect to highways as a county is with regard to bridges; and where a bridge for carriages was built in the room of a foot bridge, which had been immemorially repaired by a township, the county was held liable. *The King v. the West Riding of Yorkshire.*

Yorkshire (a). It was contended on the last argument, that the trustees were liable to repair the roads newly made, at least for twenty-one years: but the trustees are not appointed by their own consent; there is no contract on their part; and therefore they cannot be compelled to repair beyond the means which they have in their own hands of reimbursing themselves: and the quantum of the tolls and number of toll-gates are restrained by the act. Though a *mandamus* might lie to compel them to do their duty, yet their duty extends no further than the proper distribution of the sums in their hands.

Bower, against the demurrer, did not dispute but that the burthen of repairing this road, not being specially provided for, must fall upon those persons who were immemorially liable; but contended that those persons could not be the inhabitants of the parish at large, because they have immemorially been exempt from it. There is a mistake in the expression, that the parish are liable of common right to repair roads; it is true that they are *prima facie* liable, that is, unless they can throw that burthen upon some other party. But this does not establish that they are liable *till any body else is*, for they are not chargeable *where any body else has been so*. So that where a parish insist that they are not liable because there is a custom for a particular district to repair, they do not claim any exemption arising from any contract subsequent to an original burthen at common law; for if it were so the form of the indictment would be different from that which is used; for it states that from time immemorial the inhabitants of a particular district have been liable. Now this only shews that, by the common law of the country with respect to this place, the inhabitants of the parish never were liable. It states what the common law is in that place. It is well known that the common law is nothing more than a collection of customs made by *Alfred* about a thousand years ago. It is equally known that the customs of particular places were preserved, as for instance, the custom of *Gavelkind*; they are therefore as much a part of the common law, with respect to that place, as any other usage which may be more general. The common law consists of general and particular customs; and in fact there are at least as many districts liable to the repair of roads, as parishes at large. The division of *England* into parishes was subsequent to the common law, not being as *Ld. Holt* thinks till the

1787.

The KING
against
SHEFFIELD.

(a) 5 Burr. 2594.

1787.

The KING
against
SHEFFIELD.

council of *Lateran*, which was two hundred years after that collection of customs made by *Alfred*. If so, this parish was never liable by the common law to the repair of the roads. Then the question is, whether that burthen can be thrown upon them, except by the positive words of the act, or, if they are doubtful, from the clear intention of the legislature. There certainly are no positive words to bind the parish, nor is there any such intention to be collected from the act. The act directs a fund to be raised which was supposed to be adequate to all the expences of the road: they did not intend therefore to provide any other fund; and they have in terms declared so by exempting those very persons who would otherwise have been liable in case of the failure of that fund. The inconveniences which would arise from any other construction are very manifest and great; for in all cases where roads are turned, and trustees appointed for that purpose by the provisions of a turnpike act which exempts the persons who were before liable for the repairs, the burthen would be taken from off particular districts who were before bound to repair, and thrown upon the parish at large. By the general turnpike act (*a*), there is a direction, that when any road shall be turned, &c. it shall be as a public highway to all intents and purposes, without giving any directions who shall be liable to repair it. Now if there were no exemption in this act of parliament of the 19 *Geo.* 3. the township of *Sheffield* would undoubtedly have remained liable; and as this road was made for the convenience of the township, they ought to repair it. A custom, that from time immemorial a particular district has repaired, resolves itself into two branches; first, that the parish at large shall not repair; and, secondly, that the particular district shall; and, as the act has only taken away the latter part, the former still remains; and therefore the parish are exempted, as they are not to be made liable by inference only.

Law, in reply.—If it be admitted that the parish are *primâ facie* bound to repair, then it follows that where any particular district have been used to repair, that is an exception to the general rule. Now in every case the rule must exist before the exception; and if the exception be taken away, the original rule must take place. As to the intention of the act itself, the legislature must have meant that the road was to be repaired by some person. It cannot be supposed that they only intended that the

(a) 13 *Geo.* 3. c. 78. s. 19.

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

III

road should exist for twenty-one years, or that the repairs were to be left to chance. But as they have said that it should be repaired as a highway, it must be repaired as all other highways are, namely by the parish at large.

1787.

The KING
against
SHEFFIELD.

Curia adv. vult.

ASHHURST, J.—now delivered the opinion of the court. The question is, whether the inhabitants of the parish of *Sheffield* are bound to repair the roads lying within the township of *Sheffield*. This doubt arises on an act of parliament, passed in the nineteenth year of this reign. Before the passing of this act the township used to repair all the highways lying within their district: but in this statute there is a particular proviso, by which it is enacted, “that no person or persons, dwelling within the township of “*Sheffield*, shall be liable to perform any statute work in repairing that part of the road leading through *Sheffield Park*, or “contribute any money towards repairing the same.” This being the case, the question is whether or not the rest of the parish are bound to repair? Now it is an incontrovertible position, that by the general law of the land the parish at large is *prima facie* bound to repair all highways lying within it, unless by prescription they can throw the *onus* on particular persons by reason of their tenure: but when that is the case, it is by way of exception to the general rule. It was argued at the bar as if a parish was only bound to repair by a particular custom; whereas it is a common law *onus* for the public benefit: and therefore where no other persons are bound to repair, the parish must do so *ex necessitate*. This manifestly appears from the different forms of indictments against the parish in general, or a township in particular. In the former there is no other allegation than that the road lies within such a parish, and that the inhabitants of it are bound to repair. But where the indictment is against a township, or particular persons, it must allege that for time immemorial they are bound to repair; which shews that the particular allegation is not necessary where they are bound by the general law. If nothing had been said in this act of parliament about the repair of the roads, excepting that they should afterwards become highways to all intents and purposes, the *onus* of repairing must by operation of law have fallen on the parish at large. But inasmuch as the township is exempted from this burden by the express words of the act, it must necessarily fall on the rest of

1787.

The KING
against
SHEFFIELD.

of the parish. Perhaps this was not in the contemplation of the legislature at the time of passing this act: but we do not go on the intention of the legislature. They have expressly enacted that the township shall not be liable; and therefore the rest of the parish must be *ex necessitate*. On these grounds we are clearly of opinion that there must be

Judgment for the Crown.

Saturday,
Nov. 17th.

ORLEY against LEE.

If the plaintiff do not declare within two terms after the return of the writ, the defendant may sign judgment of *non pros*; but if no such judgment be signed, the plaintiff may declare within a year.

RULE to shew cause why the proceedings should not be set aside for irregularity. The declaration was filed before the end of the second term after the writ was returnable; but the notice of declaration was not served till the essoign day of the third term. This was contended to be irregular, because a declaration is not well delivered till notice, and that notice in the present case was too late. And *West v. Radford* (a) was cited.

Shepherd in support of the rule.—*Baldwin* against it.

BULLER, J.—By the general rules of law a plaintiff must declare against a defendant within twelve months after the return of the writ: but, by the rules of this court, if he do not deliver his declaration within two terms, the defendant may sign judgment of *non pros*. Though, unless he take advantage of the plaintiff's neglect, the plaintiff may still deliver his declaration within the year. Therefore

Per Curiam,

Rule discharged.

(a) 3 Barr. 1452.

1787.

VERNON and Others, Assignees of ELIZABETH TYLER a Bankrupt, against HANKEY and Others.

Saturday,
Nov. 17th.

THE plaintiffs brought this action for money had and received to their own use, and to the use of the bankrupt. —Plea, the general issue.

The cause was tried before Mr. Justice Buller, at the Sittings after last Term at *Guildhall*, when the jury found a verdict for the plaintiffs for 16,930*l.* The court granted, upon the motion of *Bearcroft*, a rule to shew cause why there should not be a new trial; and the learned Judge, on a subsequent day, reported all the evidence at length which had been given at the trial: but the following are the only facts necessary to introduce the points which arose and were discussed in this court. *Tyler* had committed a clear act of bankruptcy on the night of the 2d of *May* 1785, which was well known to the defendants, who were her bankers; and it appeared by their books that so much as the verdict was taken for had been received by them on account of the bankrupt after that time. In answer to this, the defendants gave in evidence that on the 2d of *May*, before the act of bankruptcy, instructions had been given to the defendants' attorney to draw up a deed of assignment from her to them of two ships which were then at sea, and their freight, and also of an exchequer tally. That it was prepared on the 4th, but, owing to the absence of the bankrupt, was not executed till the 19th. Of this they claimed the benefit; and they also claimed to deduct a sum of 9670*l.* being the amount of draughts drawn by the bankrupt on them after the bankruptcy, in favour of creditors, and which they had paid. But the learned Judge, being against them on these two points, directed the jury to find a verdict for the whole sum.

The rule to shew cause had been moved for and obtained in order to have these questions more fully considered; and also upon an affidavit by one of the defendants and two of his witnesses who had been examined at the trial, first stating a mistake in the verdict, in a matter of figures, of 2,064*l.*; and secondly that the bill of sale of one of the ships, and an exchequer tally

A banker is not justified in paying the draughts of a person who has placed money in his hands, after he has notice of an act of bankruptcy committed by him.

Value and importance are not of themselves sufficient grounds for granting a new trial, unless there be also some doubt in the question; though they frequently weigh in obtaining a rule to shew cause why there should not be a new trial. The court will not grant a new trial to let the party in to a defence of which he was apprised at the first trial.

1787.

VERNON
against
HANKEY.

for 600 *l.* had been deposited in the defendants' hands for some time previous to the 2d of *May*, as a security for money over-drawn or to be over-drawn by the bankrupt, and which had been delivered up again to her at the time of the assignment executed; and that upon the faith of these deposits the defendants had afterwards advanced large sums of money. The assignment therefore being void, the defendants claimed a lien upon those deposits which were given up when that was taken.

Erskine, Piggott, Manley, and Gibbs, shewed cause against the rule; and, after admitting the mistake in the verdict of 2,064 *l.* which they agreed to release, contended first that the residue was money received by the defendants to the use of the assignees, and could not be appropriated to the payment of their own debts under 19 *Geo. 2. c. 32. s. 1.* and that the defendants could not reduce that sum with which they were charged by deducting 9,679 *l.* the amount of draughts drawn by the bankrupt on them after notice of the act of bankruptcy, and which had been paid by them, it not being within the proviso of 1 *Jac. 1. c. 15. s. 14.* And 2dly, that the defendants had no right, in respect of any lien, to deduct the value of the ship and freight, of which a bill of sale had been executed, or the exchequer tally. 1st, The great object of the bankrupt laws is to promote an equal distribution of the bankrupt's effects among his creditors; for which purpose formerly after an act of bankruptcy was committed there was an absolute stop put to the current of his property; he could neither pay nor receive. The first relaxation from this strict rule was made by 1 *Jac. 1. c. 15. s. 14.* which provides that no debtor of the bankrupt shall be endangered for the payment of his debt truly and *bonâ fide* to any such bankrupt before knowledge of the act of bankruptcy; therefore without this protecting provision a *bonâ fide* payment made to a bankrupt would not have prevented the assignees from recovering the same debt again. Also if a man received money from a bankrupt after an act of bankruptcy he was obliged to refund it to the assignees; therefore the 19 *Geo. 2.* extended the same benefit to persons who received money in payment from the bankrupt without notice, after an act of bankruptcy, as the statute of *James* had before given to such as paid money without notice. Indeed by this statute it is not sufficient that the party receiving the money does not know of any act of bankruptcy committed; for if he even know that his debtor is in insolvent circumstances,

stances, his receipt will not be protected by the statute. It cannot be pretended that all other persons except bankers would not be liable to pay the whole sum received, after notice of an act of bankruptcy, over to the assignees: then upon any principle can the case be varied because the defendants are bankers? The words of the statute are as general as possible; there is no exception in favour of bankers; nor could it be otherwise; for then a bankrupt would be able to defraud all his creditors, and dispose of his property through his banker in whatever manner he thought proper, although he could not do it by himself. The principle contended for would be a virtual repeal of the bankrupt laws. If actions had been brought against the defendants for refusing to pay these draughts, the bankruptcy of Mrs. Tyler would have been a good ground of defence. A banker ought not to be in a better situation than a sheriff who has money in his hands belonging to a bankrupt after notice of an act of bankruptcy: if, after such notice, he pay it over to a creditor, he does it at his peril; and therefore he is obliged to come to this court for their protection. And yet a sheriff is a public officer, and obliged to act; whereas a banker voluntarily puts himself into that situation. 2dly, As to the liens; the objection that they were not allowed can afford no ground for a new trial: at most, the defendants would only be entitled to have the amount in damages deducted out of the sum for which the verdict is taken, in case the court should think they ought to be allowed. But in fact there is no pretence whatever for setting up these liens. There was no evidence at the trial that the defendants had any deposits in their hands previous to the act of bankruptcy; they only rested on the assignment, which was void. A bill of sale indeed of one of the ships was produced in court, but it was a cancelled instrument. But even supposing the deposits to have been, as the defendants state, in their hands before the bankruptcy, that ought to have been proved at the trial; it was the very gist of their case; and as they cannot therefore allege surprize, the court will not permit them to have a new trial on that ground (a); especially as the two persons who join in the affidavit were themselves examined at the trial. *Non constat* but these deposits were placed in the defendants' hands in contemplation of an act of bankruptcy, in which case they would be void on the ground of fraud: at least, some memorandum ought to be shewn, explanatory of the

(a) *Vide* 1 vol. 84.

1787.

VERNON
against
HANKEY.

1787.

VERNON
against
HANKEY.

purpose for which they were left with them. There is still less reason for claiming a part of these liens, which arises from the freight of the ship; for that was the intermediate earnings of the ship, and accrued subsequent to the act of bankruptcy: There can be no lien upon rents and profits. On both grounds therefore the verdict ought to stand for the sum claimed by the plaintiffs.

Bearcroft, Wood, and Douglas, in support of the rule.—This is a question of considerable doubt in point of law, of great value to the parties, and of general importance to trade, which have always been allowed as sufficient reasons to induce the court to grant a new trial, in order that the case may be thoroughly investigated. The verdict in this case shews it to be of great value to the parties; it is likewise of importance to the public that the law on this subject should be understood, in order to which the question should be put in a way of being finally decided in the House of Lords; and it is a new question and of doubt, for no case has been cited to shew that a banker stands in the same situation with other persons in the construction of the bankrupt laws; and there are strong reasons for entertaining a contrary opinion, because their peculiar situation is such that the law does not permit them to reason like other persons. The general question now to be considered is whether a banker, making the payments which the defendants have done in this case, is a debtor within the statute 1 Jac. I. c. 15.; the fourteenth section of which enacts “That no debtor of the
“bankrupt shall be endangered for the payment of his or her
“debt truly and *bonâ fide* to any such bankrupt before such
“time as he shall *understand* or know that he is become a
“bankrupt.” The word “understand” here used must import not only a knowledge of the fact itself which constitutes the act of bankruptcy, but also of the legal effect of it; otherwise the word “know” would have been sufficient. It is contended that it is incumbent on a banker, who has notice of an act of bankruptcy, to refuse payment of a draught to a *bonâ fide* creditor without notice, although he may have a large sum of money in his hands belonging to the drawer: but so many absurdities would necessarily arise out of such a proposition that it cannot be supported. For he must do it at the risk of an action against himself, and what is of still greater importance to him at the risk of his own credit. He cannot know whether
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any commission will ever be taken out, or if sued out, whether it can be supported; nor can any line be drawn with respect to the time beyond which a banker would not be justified in withholding the money. These draughts, which were paid by the defendants after the bankruptcy, were drawn in favor of creditors who were ignorant of the bankruptcy, and to whom payment would have been good, if made by the bankrupt himself. And unless this verdict be set aside, there will be an unjust increase of the bankrupt's estate, because otherwise these creditors would have proved their debts under the commission. Bankers cannot be said to have the disposition of the money which is placed in their hands; it is deposited with them as in a place of security, from whence it may be taken at pleasure by the person really entitled. Suppose money be paid into the hands of a servant in the absence of his master, who had committed an act of bankruptcy within the knowledge of the former; if the servant pay the money over to his master's order, he cannot be liable to an action by the assignees. Or a banker may be considered in the character of an agent, and may be thus protected in the payment of just debts. If he be the agent of the assignees in receiving money for their use, he must equally be considered as their agent in paying it over. 1 *Atk.* 126. And this being an equitable action, the court ought to make every allowance which a court of equity would have done. 2 *Burr.* 942. It has been said that a creditor, a payee of a bill of exchange drawn by the bankrupt, cannot maintain an action against a banker, after notice of an act of bankruptcy, to recover money in his hands belonging to the bankrupt: but the act of bankruptcy would be no answer to such an action, for the property is not divested out of the bankrupt till the commission and assignment. Then, if it may be recovered in an action, the banker may pay it voluntarily; for every payment is good which the law would have compelled. And this further inconvenience would arise from permitting bankers to refuse paying the money of their creditors under the pretence of a secret act of bankruptcy having been committed by them, that it would produce many commissions of bankrupt which would not otherwise be sued out. But if the court should be of opinion with the plaintiffs upon the question of law, there are other grounds upon which the defendants are entitled to a new trial. First, upon the ground of a lien on the deposits: these were left with the defendants as a se-

1787.

VERNON
against
HANKEY.

1787.

VERRON
against
HANKEY.

curity for money advanced by them to the bankrupt, the profits of which they have not been allowed in the verdict which has been given against them. Whether or not the pledges were originally left with the defendants expressly as a security before the bankruptcy, though not formally assigned till afterwards, is a question for the consideration of the jury; and as that question has never been submitted to them, that alone is a sufficient reason for sending the case back again to be reconsidered. At the trial the defendants came prepared to litigate the act of bankruptcy, the knowledge of it by them, and the validity of the assignment. They ought not therefore now to be precluded from enquiring into that which appears to be a substantial defence to part of the plaintiffs' demand. These deposits could not be produced by the defendants at the trial, because they were delivered up to the bankrupt at the time of the assignment: and if any receipt or acknowledgment passed, it must have been given to the bankrupt, which likewise accounts for the non-production of any memorandum concerning them. These deposits are equal to a sale in equity, therefore the defendants were entitled to the freight of the vessel. If this question arose in a court of equity, the defendants would undoubtedly be entitled to these pledges as a security *pro tanto*. It is true indeed that the defendants afterwards gave them up on taking the assignment: but, that assignment being void, the lien revived. At all events as the plaintiffs acknowledge that the jury have given 2064*l.* more than was due, the defendants are entitled to a new trial on that ground. And if the court should be of opinion that a new trial ought to be granted on either of the two latter grounds to correct that part of the verdict, the value of the sum in litigation and the importance of the question will induce them to grant it generally.

ASHHURST, J.—The two grounds on which the present application for a new trial is made are, first, that the defendants are entitled to an allowance for the money which they paid on the bankrupt's draughts, though subsequent to an act of bankruptcy committed by her, and full knowledge of it by the defendants; and secondly that they are entitled to the produce of the deposits, on which they claim a lien antecedent to the act of bankruptcy. The first of these points supposes the verdict to have been given against law; the second is raised on an allegation of surprise at the trial. Now with regard to the first of these points

points; it has been argued that if the case involve in it a question of doubt, of great value, or of general importance, it is a sufficient ground for granting a new trial; and that in the present case all these circumstances concur. But if it be not a matter of doubt, the greater the value, the less reason is there for granting a new trial; because the plaintiffs would be so much longer deprived of the fruits of the verdict to which they are entitled. There can be no doubt in this case; for it is extremely clear that no payments, made either by or to a bankrupt, are protected by the statutes of 1 Jac. 1. c. 15. and 19 Geo. 2. c. 32., when the party either paying or receiving has knowledge of an act of bankruptcy committed. Here the act of bankruptcy was known to the defendants. Then is there any thing in the particular situation of the defendants to exempt them from the general law on this subject? No argument which has been urged has raised the smallest doubt in my mind; for I cannot conceive why a banker should be in a different situation from the rest of the king's subjects in the construction of these statutes. It has been said that the defendants were bound to pay over the bankrupt's money: but the question is whether or not this was the bankrupt's money; and whether it was not known to them that it was not. Every man is equally bound to know the law; therefore the defendants must have known that a person, who has committed an act of bankruptcy, is not a free agent, and has no longer the disposition of his property. They knew that they were not bound to answer the bankrupt's draughts; they must have known that they were doing an illegal act, and were assisting in committing a fraud on the rest of the bankrupt's creditors; the spirit of the bankrupt laws being an equal distribution of the effects of the bankrupt. So that these defendants, who have taken upon themselves to pay particular creditors the whole of their demand out of that fund which ought to have been equally distributed to all, are not entitled to any favor. A second question has been made with regard to the produce of the deposits, the allowance of which the defendants claim in respect of the lien which they had on them previous to the bankruptcy. If that matter had been clearly made out at the trial, I have no doubt but that the defendants would have been entitled to the allowance. But the question is whether we ought to interpose now, as the defendants were aware at the trial that it was incumbent on them to establish that fact; for they produced the assignment of the 19th of May: but

1787.

VERNON
against
HANKEY.

1787.

VERNON
against
HANKEY.

failing in that defence at the trial, they now set up another ground, namely, that they have an equitable lien; inasmuch as the deposits, which were the consideration of that assignment, were in their hands before the bankruptcy. Now it is material to consider whether, in a case so circumstanced as the present, where a party, who has a defence which he knows is necessary to be established at the trial, but, neglecting to make use of that, relies upon another in which he fails, shall afterwards be permitted to avail himself of the first as a ground in this court for a new trial: such applications should be cautiously admitted, as it would be a great inlet to perjury. Therefore on both grounds I am of opinion that a new trial ought not to be granted.

BULLER, J.—It is a great personal satisfaction to me that this matter has been brought before the court. Motions for new trials have been very much encouraged of late years, and I shall never discourage them; for nothing tends more to the due administration of justice, or even to the satisfaction of the parties themselves, than applications of this kind. The court and the counsel are enabled to consider the question more fully than they could do in the hurry of business at *Nisi Prius*. The grounds which have been mentioned by the defendants' counsel have frequently been allowed and ought always to govern the court in granting rules to shew cause why there should not be a new trial. But there is a wide difference between the reasons which ought to induce the court to grant such rules, and those which are sufficient to grant new trials. It is well known that in this court a rule to shew cause why there should not be a new trial is granted for little more than asking, if any plausible doubt can be stated: but if this were to be followed up by making the rule absolute on the same grounds, it would be great injustice to the parties, and would tend to multiply litigation to an enormous degree. Value alone is not a ground for granting a new trial, although it frequently weighs in granting a rule to shew cause. The question in this stage of the business is, whether on any part of this case there is a serious ground for doubt. The present motion has been made, not on the ground of surprise, or on any new discovery made since the trial, but because the defendants have made a mistake at the trial, and have not availed themselves of an advantage, to which they were entitled, if in point of fact they could have made it out. The second ground is that there was a mistake in point of law; for that the

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defendants are not within the meaning of the bankrupt laws, and that they are entitled to deduct those payments which they made to the bankrupt's creditors subsequent to notice of the act of bankruptcy. These are the two great points: for as to another which has been made in the course of the argument, I think it hardly deserves a serious answer. This is not like the case put in the course of the argument, that if the assignees admit the receipts by the defendants to be good, considering them as agents, they shall likewise be considered as agents with respect to the payments made by them. The cases in which that objection has been allowed are where money has been levied under an execution, and paid over to the party; but there the whole is one act. If the sheriff had a right to levy money under an execution, he was bound to pay it over to the party at whose suit the execution issued, and therefore it was deemed inconsistent to say that the sheriff levied the money legally but paid it illegally. But there is no inconsistency in this case: the law says that what the defendants received from the bankrupt after the bankruptcy is the property of the assignees; and they have a right to demand it as money received to their use; but it is impossible to say, on this evidence, that the assignees have given the defendants a power, or even consent to pay the money in question to the particular creditors. Then laying that out of the case, I will first consider the question of law, whether the defendants, as bankers, are within the two statutes of *Jac. 1.* and *Geo. 2.* It is admitted, and it is clear from the statutes, that the legislature have expressed themselves in the most general terms; they speak of persons in general; and therefore if there be any exception in favour of bankers, it is incumbent on the court to find out some clear ground for the distinction. It was first said that the defendants were not debtors of the bankrupt: but that cannot be sustained on any ground; for if a merchant pay 1000*l.* into a banker's hands, he is a debtor for so much, and, if he refuse to pay it on demand, may be arrested for it: and the merchant has the same common remedy to recover it, which every creditor has against every debtor. As to the word "understand," which is used in the statute of *James*, and which has been commented upon, it is too much to say that it can become a question, whether a party did or did not know the law: if he understand the fact, that is sufficient; he must know the law, and is bound by the consequences. It often happens that criminals

1787.

VERNON
against
HANKEY.

1787.

VERNON
against
HANKEY.

nals are tried for facts, the legal consequences of which they did not know; this is more particularly the case where the offence is created by a new statute: but if the facts be clearly established against them, they must abide by the consequences. In deciding this case it is material to consider, first, the situation in which the defendants stand, and secondly, to what a vast extent the proposition contended for by them would lead, if it were permitted to prevail in this instance. The defendants are not mere bankers. It does not necessarily follow that a banker should know the situation of those who employ him, and if he has no notice of their insolvency, he will be protected in the payments which he makes to them. But these defendants, who were creditors of the bankrupt to a large amount at the time of the bankruptcy, had the fullest notice of the insolvency and bankruptcy; and they endeavoured to prop the credit of the bankrupt in order to save themselves. The consequences of the proposition contended for by the defendants' counsel would be that if a creditor gave notice to a banker, in direct terms, that the debtor had committed an act of bankruptcy, that a docquet had been struck against him, and according to a part of the argument, that he had even been declared a bankrupt, yet if no assignment were executed, the banker might continue to pay the draughts of the bankrupt. Such a proposition cannot be supported; therefore I have not the smallest doubt on the question of law. The case put at the bar with respect to a sheriff is not inapplicable: the courts have said that sheriffs being ministers of justice are entitled to the protection of the courts if they act honestly: but it has always been held as clear law, that if a sheriff, after notice of a bankruptcy, proceed to levy, though no commission be taken out, he must do it at the peril of answering to the assignees. But a banker cannot be in a more favourable light than a sheriff, because he voluntarily puts himself into that situation.

The next question is, whether in point of fact there has been any mistake in the verdict: now, excepting as to the 2064*l.* which is allowed to be a mistake in figures, this depends principally on the affidavit. But supposing the defendants to be right, it only impeaches the verdict for 1450*l.* For as to one of the securities for one of the ships, which came into the defendants' hands after the act of bankruptcy, there can be no pretence for a lien on that. Then are the court warranted in saying

saying positively, from the affidavits, that the defendants had part of these securities in their hands previous to the act of bankruptcy? It is sworn that the bankrupt was in the habit of drawing on the defendants to a large amount, and that she frequently deposited securities with them. The securities in question, it is said, were put into the defendants' hands for money over-drawn, *or to be over-drawn*. But even if we were at liberty to rest entirely on the defendants' account, it is by no means satisfactory; because they ought to have known the exact time when those securities were deposited in their hands: there must have been some entry in the defendants' books concerning them; but none such has been stated. Again, it is left very loose on these affidavits, whether these securities were given for money then due, or which was afterwards to become due: if the latter, as these draughts were paid after the bankruptcy, without any previous obligation on them, that would not assist them. With respect to what was sworn by the attorney at the trial, that on the 2d of *May* instructions were given to him to prepare a legal assignment; that is not sufficient; for it does not appear from thence that the deposits were left in the defendants' hands as a specific security before the bankruptcy. Therefore I am of opinion that we ought not to grant a new trial.

GROSE, J.—I agree with the defendants' counsel respecting the grounds of moving for new trials, and also with what has fallen from the bench respecting the true grounds for granting them. It is not sufficient that a cause is of value, or of importance; but it must also involve in it a doubt to induce us to grant a new trial. The suitors frequently derive great benefit from having their causes thoroughly investigated on such motions; for it often happens from some accident that complete justice is not done at *Nisi Prius*: but on considering the matter afterwards in court, unless it appears to be of doubt, it would be unjust to send the parties to another trial. The present question is of value and of importance, but of no doubt: and as to the mistake in the figures, there is no occasion to send the cause back again to the jury on that ground, since it may be corrected by the Judge's notes, and the plaintiffs are ready to remit the difference in damages. Another ground for a new trial which has been made in this case is on a misdirection in point of law: it is urged that above nine thousand pounds ought to be deducted out of the sum recovered, on the ground that the defendants, as bankers, having

1787.

VERNON
against
HANKIN.

1787.

VERNON
against
HANKEY.

paid the bankrupt's draughts in favour of creditors to that amount, are not to be considered as debtors within the statute of *James the First* (a). But why not? The words of that statute are general and clear. Bankers are subject to the bankrupt laws; and are liable to be sued, and to every process and consequence which any other man is who has received the money of another, and withholds it. If there be any hardship in their particular case, as has been said, the legislature must remedy it. But this is a general law; and if the legislature had intended to make any exception in favour of bankers, they would have expressed themselves to that effect. Then it is said that they are to be considered as mere servants, and that the money is merely deposited with them as a place of safety, from whence the identical money may be taken by each individual who has so left it: but if that were so, and a banker had no other property than what might be thus deposited with him, and a commission of bankrupt were to be taken out against him, a creditor for work and labour would not be entitled to receive any thing under the commission, as every person would be entitled to take his own money. But that is not the case; and therefore a banker is a debtor as much as any other person is who receives the money of another. So that there does not appear to have been any misdirection. Another reason which has been urged for a new trial is on the ground of surprize, for that the defendants only went to the trial prepared to dispute the bankruptcy of *Mrs. Tyler*, their knowledge of it, and the assignment. This does not appear to have been a mistake of the counsel, but of the parties themselves; for the question relative to the lien being entirely within the knowledge of the defendants, they ought to have instructed their counsel to rely upon it. But they chose to rely solely on the assignment; and having failed in establishing that point, they now set up an equitable lien on the ground of the securities having been deposited in their hands for debts previously due: now that does not clearly appear from the affidavits, for they are stated to have been deposited "for money over-drawn or to be over-drawn;" but whether for the one or the other does not appear; it might have been for either; and in all probability it was as a security for the latter, since the affidavits go on to state that on the faith of these deposits the defendants had advanced divers sums of

(a) 1 Jac. 1. c. 15. s. 14.

money. Indeed if these deposits had been made for a debt antecedently due, it would have been right and legal to have allowed the lien: but if that had been the real fact, the defendants might easily have shewn it. Therefore I cannot say that on the ground of surprise there should be a new trial; particularly as two of the witnesses, who were examined at the trial, and to whom the whole of this transaction was known at that time, join in the affidavits.

Rule discharged.

DAVIES *against* PIERCE and Others (a).

Saturday,
Nov. 17th.

THE Court, having last term determined that the bill of exceptions in this case was properly tendered, and that the evidence ought to have been received at the Great Sessions at Cardigan, from whence this case came, ordered the case to stand over, in order to consider what judgment ought to be given. And now a *venire de novo* was awarded into Herefordshire.

ASHHURST, J.—There being no adjudication upon this subject in point, we can only form our opinion upon the sense and justice of the case. As the jury have not exercised any judgment upon the whole of the question, it ought to be submitted to them for their consideration; and without their intervention we cannot give a final judgment on this record.

BULLER, J.—As we have pronounced judgment in favor of the bill of exceptions, it remains to be considered what is to be done next. Now unless some extraordinary reasons be urged to the contrary, I have not the least doubt but that a *venire de novo* must be granted; for if it be not, the consequences would be such as could not be supported in a court of law. When we held that this evidence should have been received, we did not determine that it was conclusive, but only that it ought to have been submitted to the jury. What effect it would have had on their minds it is impossible for us to say; perhaps they might have totally disbelieved the evidence offered, or might have thought that it did not outweigh the contrary evidence. It

If there be a bill of exceptions to the rejection of evidence in the court of Great Sessions in Wales, and upon error in K. B. the evidence is deemed admissible, the court of K. B. will award a *venire de novo* into the next English county.

(a) *Vide sup.* 53.

1787.

DAVIES
against
PIERCE.

seems to me therefore to be impossible that we can do otherwise than grant a *venire de novo* (a).

A suggestion having been entered upon the record that *Cardiganshire*, where the trial was had, was out of the jurisdiction of the court, the *venire de novo* was awarded into *Herefordshire*, as being the next *English* county.

(a) A *venire de novo* may be granted where the jury are improperly chosen, or where there is any irregularity in their being returned. 6 Co. 14. Sty. 307. 2dly, Where the jury have improperly conducted themselves. Bro. title *Process*, pl. 72. Hil. 8 Hen. 7. rot. 3. cited in 2 Stra. 887. 3dly, Where the declaration consists of several counts, and the jury give general damages, and it afterwards appears that one of them is defective. *Eddowes v. Hopkins*, Dougl. 361. *Grant v. Asple*, Dougl. 695. 4thly, Where an imperfect verdict is found. 2 Ro. Abr. 721. pl. 10. 722. pl. 16, 17, 18, 19. *Love-day's case*, 8 Co. 65, b. Bro. Abr. title *Venire Facias*, pl. 12. *Dod v. Eaton*, Sty. 64. *Ratcliff v. Dudeney*, Sty. 176. *Swan v. Fenham*, Sty. 410. *Horewood v. Holman*, 2 Bulstr. 32. *The King v. Sykes*, Sir T.

Raym. 202. *The King v. Hayes*, 2 Lord Raym. 1521. *Kynaston v. the mayor of Shrewsbury*, 2 Str. 1051. *Hafwell v. Chalie*, 2 Str. 1124. *Wells v. Parker*, ante, 1 vol. 783. [But in *Street v. Hopkinson*, 2 Str. 1055. it is denied that a court of error can award a *venire de novo*.] 5thly, On a demurrer to evidence. Sty. 335. *Wright v. Pynder*, Sty. 34. *sembl.*

And in 2 Lev. 236. after a bill of exceptions not entered upon record, and a motion in arrest of judgment, the court inclined to grant a new trial. But there is no instance before this in which a *venire de novo* has been granted after a bill of exceptions. And in *Fabrigas v. Mostyn*, 2 Blackst. 929. the court refused to grant a new trial on the point of law contained in a bill of exceptions then depending.

Monday,
Nov. 19th.

BONAFOUS against WALKER.

In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution. An administratrix may maintain an

action in her own name against the marshal for the escape of a prisoner who is in execution on a judgment obtained by her as *administratrix*. A voluntary return of a prisoner, after an escape, before action brought, is equal to a retaking on a fresh pursuit: but it must be pleaded. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape: and the plaintiff may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. An escape from the Rules of the *King's Bench* prison without the marshal's knowledge is not a voluntary escape.

from

from thenceforth until now hath detained and still detains him for the cause aforesaid. 3dly, As to the second count, that *Rybot* escaped without the privity or consent and against the will of the defendant, and before the defendant had any notice of the escape, *ff.* on the 4th *November* in the 27th year. &c. the said *Rybot* into the defendant's custody without the knowledge of the defendant returned and continually after such return hath been detained in execution, &c. Replication, that the defendant did not freshly and diligently pursue *Rybot*, in order to retake him, &c. And, as to the third plea, that *Rybot* was not continually after his return detained in the defendant's custody in execution; and issues thereon.

1787.

BONAFOUS
against
WALKER.

At the trial of this cause before *Buller, J.* at the Sittings at *Westminster* after last term, it appeared that *Rybot* had been taken in execution on a judgment obtained against him by the plaintiff, as administratrix of her husband, and regularly committed to the custody of the marshal. The *ca. sa.* was indorsed to levy 344*l.* besides sheriff's fees, &c. *Rybot*, who had the liberty of the rules of the prison, was proved to be out of them on three several days, the last of which was on the 3d of *November* last; but on the defendant's hearing that the prisoner had escaped beyond the rules, he was put in close custody on 4th *November* before the action was brought. The defendant's counsel first objected that this action ought to have been brought by the plaintiff, as *administratrix*, because the judgment on which the party had been committed in execution was obtained by the plaintiff as administratrix of her husband; and secondly that the plaintiff could not give a *negligent escape* in evidence under the first count, which was for a *voluntary escape*: but the Judge overruled both objections; the latter on the authority of *Sir Ralph Bovy's case (a)*. It was then contended on the part of the defendant that though the plaintiff was entitled to recover, yet that the jury were not bound to give the whole sum demanded, though it were an action of debt; and that, if it could be left to their discretion under the circumstances of the case, they would only give nominal damages: but the learned judge was also of opinion against him on this point, and directed the jury to find a verdict for the plaintiff for 344*l.*

(a) 1 *Ventr.* 211, 217.

1787.

BONAFOUS
against
WALKER.

Erskine obtained a rule to shew cause why there should not be a new trial. First the action ought to have been brought by the plaintiff, *as administratrix*; and he cited *Wate v. Briggs*, 1 *Ld. Raym.* 35. where this point was ruled. [*Per Curiam.* That case cannot be law (a): the instant the plaintiff recovered a judgment against *Rybot*, it became a debt *due to her* on record, and was affets in her hands; for which it was not necessary to declare as *administratrix*.] Secondly, by the evidence this appeared to be a *negligent*, and not a *voluntary*, escape; and therefore could not be given in evidence under the first count. By the 8 & 9 *W. 3. c. 27*, the marshal has a right to suffer a prisoner to go within the rules of the prison; so that in this case the defendant stands in the same situation as if the prisoner had escaped over the walls of the prison. And by the 6th section of that statute, the marshal has a right to retake a prisoner on fresh pursuit, but it provides that he shall not give such matter in evidence unless he plead it specially. Now here the defendant has pleaded a retaking on fresh pursuit to the negligent escape. But as he could not plead it to the voluntary one, it seems absurd that the plaintiff should be at liberty to give in evidence a negligent escape under that count. This then must be considered as if there were only one count for a negligent escape, in which case the defendant was entitled to a verdict; because *Rybot* was in prison before the action was brought. The cases of *Hawkins* and *Another v. Plomer* and *Another* (b), *Boyton's* case (c), and *Ridgway's* case (d), clearly prove that a sheriff is excused for a negligent escape even in execution, provided he take the prisoner on fresh pursuit before action brought. And the number of escapes in this case cannot vary the question, as *Rybot* was in safe custody before the commencement of the present action. If then the marshal be excused by retaking a prisoner, who has escaped, on fresh pursuit, it seems absurd that he should not be equally justified by the voluntary return of the prisoner before action brought; because he might return before the marshal had notice of the escape. Thirdly, notwithstanding this

(a) *Vide Glover v. Kendal*, 1 *Lutw.* 893. *Brooks v. Cooke*, 1 *Show.* 57. *Carew v. Braubton*, *Lane* 79. *Townley v. Steele*, *Hutt.* 79. *Martin v. Henaley*, *Sty.* 232. *Holdin v. Sutton*, 1 *Ld. Raym.* 698. *contra.*

But *Crawford v. Whittal*, *Dougl.* 4. n. 1. agrees with this opinion.

(b) 2 *Black. Rep.* 1048.

(c) 3 *Co.* 44.

(d) 3 *Co.* 52.

was an action of debt, the jury might have given less damages than the whole sum demanded. If this had been an action on the case for the same cause, it is admitted that the jury might have given only nominal damages. Then it is strange that the nature of the action should alter the right of the parties or the law upon the subject. Though formerly the courts were rather strict in actions of debt, yet there has been a great relaxation in modern times: and now it is not necessary that the plaintiff should recover the whole sum demanded (a). But even if there be no relaxation of the strict original rule, this verdict is wrong; for the jury should have given the whole sum declared for, namely, 2019*l.* or nothing. If the jury were at liberty to give 344*l.* which is less than the whole sum demanded, they ought not to have been prevented from exercising their own discretion, in which case they would only have given nominal damages. Therefore the defendant is entitled to a new trial on this ground; for a verdict for too little is as irregular as a verdict for too much.

BULLER, J.—The distinction between an action of debt and on the case is this; at common law an action on the case only lay against the sheriff or gaoler for an escape, in which case the creditor might recover damages for the officer's misconduct; but still he had a right to recover the debt against the original debtor. But the statutes gave an action of debt against the sheriff or gaoler to recover at once the sum for which the prisoner was charged in execution. Now those being affirmative statutes did not take away the common law remedy; so that the creditor has his election: but if he adopt the latter, he must recover the whole sum (b). But the only point on which I had any difficulty is, whether a voluntary return of the prisoner before action brought be not equivalent to a retaking on a fresh pursuit. There is a strong case to this effect in *Comyns* (c), where the prisoner's return before action brought was held tantamount to a retaking on a fresh pursuit. It is not indeed stated in that case whether it was after the return of the writ, though it appears that the prisoner was in execution.

Bearcroft, Bower, and Gibbs, shewed cause against the rule; and, with respect to the second objection, contended that, as between the creditor and the marshal, this must be taken to

(a) *Vide* 2 *Black. Rep.* 1221. *Dougl.* 6.
703. n. 4.

(b) 2 *Black. Rep.* 1048.

(c) *Chambers v. Gambier*, *Com. Rep.* 554.

1787.

BONAPOUS
against
WALKER.

be a voluntary escape. For though the rules are to some purposes considered as the walls of the prison, yet the marshal may permit a voluntary escape even from the walls of the prison; as if he were to put a prisoner into a room manifestly insecure. Now by giving the prisoner the rules of the prison without placing any guard over him, he knowingly and willingly afforded the prisoner an opportunity of escaping. And the stat. 8 & 9 W. 3. c. 27. which is relied on makes no difference in this case; for though the 1st section enacts that the marshal shall keep the prisoners within the walls of the prison or the rules thereof, yet no authority to the marshal can be inferred from thence to permit a prisoner to go at large within the rules without a guard to attend him. But the very reverse is to be collected from the statute, which says that the marshal *shall keep* the prisoners within the walls or rules. There is nothing compulsory on the marshal to grant the rules of the prison; he must exercise his own discretion, and it is at his peril that he does it. And though the marshal may take security on the prisoner's obtaining the rules, yet there is no privity in that respect between him and the creditor. And there can be no hardship on the marshal's being responsible in these cases, because he should take care to have a sufficient security. But if this cannot be considered as a *voluntary* escape it is immaterial in the present instance. For the case in *Ventris* is decisive that the defendant might have pleaded to the first count, which was for a voluntary escape, that he took the prisoner on fresh pursuit, without traversing the voluntary escape. But as he has not pleaded that matter to the first count, the evidence of retaking on fresh pursuit was inadmissible on the general issue; and then the plaintiff is entitled to retain the verdict. As to the third objection: strictly speaking perhaps the verdict should have been taken for the whole debt; though the plaintiff could not have levied under the execution more than was really due. At the trial it was contended on the part of the plaintiff that she was entitled to the sheriff's fees of poundage upon the execution; because she might have recovered that sum against the prisoner himself. But the judge being of a different opinion, the present verdict was taken under his direction. But if that be not correct, it is not now too late to move to enter up the verdict according to the real truth of the case, as the issue is found for the plaintiff. At all events the defendant cannot

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urge it as a ground for a new trial; he cannot complain that any injustice has been done to him, because the plaintiff has recovered too little against him: and if this be a defect, it is an error upon the record itself, of which the defendant may take advantage by moving in arrest of judgment.

1787.

BONAFOUS
against
WALKER.

The counsel in support of the rule were stopped by the court.

ASHHURST, J.—This must be considered as a *negligent*, and not as a *voluntary*, escape; for by the 8 & 9 W. 3. the rules are to all intents and purposes the same as the walls of the prison. On the whole there appears to have been a mistake by confounding the different counts in the declaration. And as the plaintiff is at liberty to give a *negligent* escape in evidence under the count for a *voluntary* escape, the defendant ought to have the liberty of pleading *de novo*, in order that he may put that upon the record, which appears to be a good defence for him; and the plaintiff may have liberty if he please to amend his declaration.

BULLER, J.—It is impossible to consider this as a voluntary escape. The escape is not voluntary unless it be with the consent or by the default of the marshal: but his allowing the rules of the prison is no default in him, because the law has given a sanction to it; and it cannot be inferred from thence that he consented to the prisoner's escape, because he took security that the prisoner should not go beyond the rules, and immediately on his return the defendant confined him in close custody; therefore this must be taken to be a negligent escape. As this record stands, the plaintiff is entitled to a verdict, and so far it is right; because the marshal on the general issue could not give evidence of fresh pursuit. But at the trial the law was mistaken by the counsel on both sides and by myself. It was contended on the part of the plaintiff, that this was a voluntary escape, which was denied by the defendant's counsel, both of them going on the mistaken idea that a voluntary escape was material to be proved on the first issue: at first I fell into the same mistake, but on recollecting the case in *Ventris* I ruled otherwise. Now in a case of this sort, where both parties were in an error at the trial, there is no objection to the court's interposing to let them into the justice of the case, which can only be effected by granting a new trial, with liberty to amend the pleadings. With respect to the other objection; a question has been raised, whether the plaintiff was entitled

1787.

BONAFOUS
against
WALKER.

entitled to recover the whole penalty, and to levy under that the poundage and fees of execution. I am clearly of opinion that the plaintiff was not entitled to recover the whole of the penalty. This action of debt depends on two very old statutes, which never have nor can be construed literally; the first of which is *Westm. 2. (a)* which is entitled "The masters' remedy against their servants, and other accomptants." If we were to stop here, this case would not come within it: but then it enacts "Let the sheriff take heed that he do not suffer him (the prisoner) to go out of prison, and if he do, and be thereof convicted, he shall be answerable to his master of the *damages* done to him by such his servant, according as it may be found by the country, and shall have his recovery by writ of debt." This statute therefore enacts that the creditor shall recover against the gaoler those damages which he has suffered by his servant. And this statute, by a liberal construction, has been held to extend to all cases. The next is the statute of 1 *Ric. 2. c. 12.* which in express terms only mentions the *warden of the Fleet*; but that also by construction has been extended to all gaolers. The sense of these statutes is, that the party, who suffers by the escape, shall have the same remedy against the gaoler which he had against the debtor. But he cannot recover more than he could have recovered against such original debtor; and the debtor in this case would have been entitled to be discharged on paying what was really due. Then as to the poundage; I think I was wrong in what I said at the trial; for the poundage is part of the debt, and the prisoner could not have been discharged out of execution without paying the poundage: and therefore if the plaintiff was entitled to recover at all, he was entitled to recover the poundage as well as the debt.

GROSE, J.—In these kind of cases, I have always understood that a sheriff or gaoler is to be put, as between him and the creditor, exactly in the place of the debtor, according to the construction which my brother *Buller* has given of these statutes. There is an allowed distinction between an action of debt and an action on the case; in the latter case, where an action is brought for an escape, the jury are at liberty to give such damages as they shall think right under all the circumstances of the case, and a shilling is frequently sufficient; for many cases arise of great

(a) 13 Ed. 1. c. 11.

hardship against the gaoler. But I take the true construction of these statutes to be that, where a prisoner escapes out of execution, the gaoler is put in the same situation in which the original debtor stood, and is liable to pay what the original debtor would have been obliged to pay. And I also think with my brother *Buller* that the plaintiff, if he be entitled to recover at all in this action, may recover the poundage. But in order to come at the justice of this case, I think there should be a new trial, with liberty to the parties to plead *de novo*.

ASHHURST, J.—then declared that he was of the same opinion, that in this action the marshal is in the same situation as the original debtor was; and that the plaintiff was entitled to take the poundage as well as the debt, if he were entitled to recover either.

Per Curiam. Let there be a new trial on payment of costs by the defendant, with liberty to both parties to amend the pleadings.

ROE on the Demise of HUNTER against GALLIERS and Others, Assignees of GREEN a Bankrupt.

Tuesday,
Nov. 20th.

IN this ejectment a special verdict was found before *Gould, J.* at the last assizes at *Hertford*, which stated that *John Hunter*, being seized in fee of the premises in question, demised the same by two several leases dated 24th December 1778 to *Green*, who for some time before had been and afterwards continued to be a dealer in horses, for twenty-one years from *Michaelmas* 1778, at rack rents for both farms of 150*l.* a year, without any fine or other consideration than the yearly rents; in each of which leases is contained the following proviso, "that if the said yearly rents thereby reserved, or either of them, or any part thereof, shall be behind or unpaid for twenty days next after the respective days of payment, being lawfully demanded; or if the said *J. Green*, his executors, or administrators, shall assign over the indenture of lease; or assign or let the premises thereby demised, or any part thereof, to any person whatsoever for any time or times whatsoever, without the license or consent of the said *J. Hunter*, his heirs, and assigns, first had or obtained in writing under his or their hands for that purpose; or if the said *J. Green*,

A proviso in a lease for 21 years that the landlord shall re-enter on the tenant's committing any act of bankruptcy, whereon a commission shall issue, is good.
See 2. Stra. 947.
Quare, n. in this case the tenant demised to the assignee his estate adm. assigns.

1787.

ROE
against
GALLIERS.

his executors, or administrators, shall commit any act of bankruptcy within the intent and meaning of any statutes made or to be made in relation to bankrupts, whereon a commission shall issue, and he or they shall be found or declared to be a bankrupt or bankrupts; or if he or they shall make any composition with his or their creditors for the payment of his or their debts, though a commission of bankrupt doth not issue, or if he or they shall make any assignment of his or their effects in trust for the benefit of his or their creditors; that then and from thenceforth in any of these cases it shall and may be lawful to and for the said J. Hunter, his heirs, and assigns, into the said demised premises to re-enter, and the same again to have, re-possess, and enjoy, as in his or their former estate, any thing therein contained to the contrary notwithstanding." It is then found that counterparts of the said leases were executed. That the two farms after such demise and before the bankruptcy of Green were improved by the bankrupt 30*l.* per ann. It then states the act of bankruptcy; that a commission issued thereon on 3d February 1787; and that Green was duly found and declared a bankrupt. And that the defendants afterwards entered into the premises, and were possessed as assignees under the commission and the usual assignment; upon whom the said John Hunter afterwards entered. But whether, &c.

*Py. 152.
See 1. An. D. 123.
Cro. Eliz. 757.*

Rous, for the plaintiff, first laid out of the question one fact stated in the special verdict, relative to the improvement of the estate, which he observed was immaterial to the decision of this case, (and to which the court assented.) This question arises out of the case of *Doe dem. Ld. Stanhope v. Skeggs* (a), in which the court were equally divided on the legality of a clause in a lease which restrained the assignment by the executors. The court there doubted whether an assignment in law by an executor was a forfeiture of the lease, because as it was leased to the original tenant and his executors *eo nomine*, it was argued that the restriction was inconsistent with the grant, inasmuch as alienation was necessary to execute the trust of the executorship. The ground which will be relied on here, and which was also a ground of argument in that case, is, that this is a stipulation by two parties against the rights of creditors. But a right, which has never attached, cannot be said to be divested. And here, by the express terms of the contract, the estate is absolutely

*(a) T. 21 G. 3. B.R. Ke S.C.
cited in a note in Dougl. Rep. 176.
1st ed.*

determined

determined by the bankruptcy of the lessee. The creditors of the lessee have no more reason to complain of the determination of this estate than of the happening of any other event on which the debtor's estate depended; as if he held an estate *per auter vie*, and that life dropped. As it cannot be pretended that this proviso is contrary to any positive law, this case must be argued on the ground of some supposed inconvenience: but that, even if it were true, would not be a sufficient ground to induce the court to rescind the express contract of the parties. In determining this question, it is material to consider the nature of this contract: it is an agreement respecting the culture of the land over which the lessor, at the time of entering into the contract, had an unlimited *jus disponendi*; and he contracts with the tenant to let him have the possession of the land in consideration of receiving a certain stipulated proportion of the annual profits and of having the land properly cultivated; while the tenant on his part is to receive a just reward for his labour. Such is the manifest intention of the parties, and this proviso is the only effectual means of carrying that intention into execution. As long as leases have existed, covenants respecting the mode of cultivation have been inserted. For the landlord's object is not merely to secure the rent for the present year, but to take care that the mode of cultivation shall be such, that the future profits shall not be diminished or the estate injured. For this purpose it is necessary that the tenant should have some skill, and a stock in proportion to the farm; it is material therefore that the landlord should fix on a tenant in whom he can confide; and he is warranted in providing that, if any event happen by which the lessee may be deprived of the means of fulfilling the contract, the land shall revert to him. It would be a hardship on the landlord to deprive him of the estate when the conditions on which he expressly leased it can no longer be complied with; for the covenants only bind the contracting parties, and the assignee in respect of his actual possession, and the lease may pass into the hands of a beggar, or one who is destitute of skill. Although the validity of such a covenant as the present has never been established in any decision, yet it appeared on enquiry in the case of *Lord Stanhope v. Skeggs* that similar covenants had been inserted in the leases granted by all the great families for fifty years preceding. And as they were never even called in question till the case of *Lord Stanhope v. Skeggs*, the acquiescence of *Westminster-hall* upon such

1787.

ROB
against
GALLIERS.

1787.

ROE
against
GALLIERS.

such a subject affords a strong presumption that they were at first inserted and afterwards continued by the advice of the most eminent men in the profession. But though this precise point has never yet been decided, the principle contended for, *cujus est dare ejus est disponere*, is universally recognized. The most whimsical disposition of the land is indulged in the old books; and even conditions, though not within the power of the covenanting party, are not invalid, if they be not impossible; as a covenant that it shall rain to-morrow. 1 Ro. Abr. 420. A court of equity will refuse to compel a lessor to renew a lease in favour of the assignees of a bankrupt. 1 Equ. Cas. Abr. 53. Much less therefore will a court of law rescind a contract which guards against such an event. And the act and intention of the person, who has the *jus disponendi*, and who afterwards becomes insolvent, have always been favoured in equity against his general creditors. *Russel v. Russel*, Brown 269. *Vandenanker v. Desbrough*, 2 Vern. 96. *Moyse v. Little*, 2 Vern. 194. *Jacobson v. Williams*, 1 P. Wms. 382. *Parker v. Dykes*, 1 Equ. Cas. Abr. 54. And *Bennet v. Davis*, 2 P. Wms. 316.

Morgan, for the defendant, contended that this condition was repugnant to the grant, and was therefore void. The former part of the lease conveys an absolute term to the lessee; therefore the subsequent proviso, which is not only repugnant, but is also to the prejudice of third persons, is illegal. This condition was inserted for the purpose of defeating the just rights of creditors, and is equivalent to a proviso that the lease should not be proved under a commission of bankrupt; and therefore it cannot be enforced. Besides, the assignment in this case cannot work a forfeiture. In *Goring v. Warner* (a), where a lessee covenanted that neither he nor his executors or administrators would assign the term without the lessor's consent, with a power of re-entry to the lessor in such case, and that the lease should be void; the lessee died, his executor entered, and afterwards became a bankrupt, and the lease was assigned over by the assignees under his commission for a valuable consideration to the plaintiff, who brought his bill to be relieved against the proviso, and to stay proceedings in an ejectment brought against him upon it; Lord Chancellor *Macclesfield* held clearly that the assignment, being done by the authority of a statute, would supersede any private agreement between the parties, and that the

(a) 2 Eq. Cas. Abr. 100.

assignment by the assignees was no breach of the condition. So in *Crusoe dem. Blencowe v. Bugby* (a), where a lessee for twenty-one years, who had covenanted not to assign, made an under-lease for part of the term, the court held that the under-lease was not a breach of the covenant or condition: and it was there said, "that the lessee becoming a bankrupt was a doing or putting it away, but it did not amount to a breach of the covenant." This proviso is also void on another ground; for the lease first contains an absolute grant of a term to a tenant, then follows a condition which operates in the nature of a grant by the tenant, and for which there is no consideration. Now every grant by a bankrupt without consideration, whereby the rights of third persons are injured, is void, both by the common law and the statutes relating to bankrupts (b). The bankrupt, by means of being in possession of this estate, was enabled to obtain a collusive credit, and to defraud his creditors. The proviso in this lease therefore must be void on the principle which governed the cases of *Ryall v. Rolle* (c), *Bryson v. Wylie* (d), and *Mace v. Cadell* (e). It will be unjust as against the creditors to construe this into a forfeiture; for the verdict states that the bankrupt improved the estate 30*l. per annum*. So that the possession of this estate has induced the bankrupt's creditors to advance large sums of money to the tenant, which he has laid out in improvements, and from which they will derive no benefit if the plaintiff succeed in this action. If this condition be enforced, it will hold out an encouragement to landlords and tenants to collude together to the prejudice of innocent parties; or it will deter persons from advancing money to farmers for the improvement of their lands, which in its consequences must be highly detrimental to the public.

ASHHURST, J.—The only question is, whether a proviso in a lease that if the lessee commit an act of bankruptcy, or, in other words, do any of those acts upon which a commission of bankrupt may be sued out, the landlord shall have a right to re-enter, is legal or not. The general principle is clear, that the landlord, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be not illegal or unreasonable.

(a) 3 *Wils.* 234.

(b) 1 *Jac.* 1. c. 15. s. 5. and 21 *Jac.* 1. c. 19. s. 11.

(c) 1 *Wils.* 260. and 1 *Atk.* 165.

(d) *H.* 24 G. 3. B. R. cited in *Cook's Bankrupt Laws.* 234.

(e) *Corwp.* 232.

1787.

ROE
against
GALLIERS.

Then is this proviso contrary to any express law, or so unreasonable as that the law will pronounce it to be void? That it is not against any positive law is admitted; no case has decided it to be illegal. In the case of Lord *Stanhope* against *Skeggs* the court were divided in opinion upon the question which arose there; therefore that is no authority either way: but considering what the ground of that difference was, it is some authority in support of this proviso; for the doubt arose upon considering whether a clause of restraint could operate upon executors to prevent them from assigning land which was expressly leased to the original tenant and *his executors eo nomine*, when that was the only means by which they could exercise their trust. Now that doubt does not occur in this case, this question turning on a different point. This proviso then not being against any express authority of law, it remains to be considered whether it is void or unlawful as against reason or public policy; now it does not appear to me to be against either. First, it is reasonable that a landlord should exercise his judgment with respect to the person to whom he trusts the management of his estate; a covenant therefore not to assign is legal; covenants to that effect are frequently inserted in leases; ejectments are every day brought on a breach of such covenants. The landlord may very well provide that the tenant shall not make him liable to any risk by a voluntary assignment, or by any act which obliges him to relinquish the possession. If it be reasonable for him to restrain the tenant from assigning, it is equally reasonable for him to guard against such an event as the present, because the consequence of the bankruptcy is an assignment of the property into other hands. Perhaps it may be more necessary for the landlord to guard against this latter event, as there is greater danger to be apprehended by him in this than in the former case. Persons who are put into possession under a commission are still less likely to take proper care of the land than a private assignee of the first tenant. Neither is there any reason of public policy to be urged against allowing such a proviso. It conduces to the security of landlords, which can never be urged as a ground of objection on that head. On the whole therefore I am of opinion that this is a valid proviso; and, the lease having been forfeited by the tenant's becoming a bankrupt, the lessor of the plaintiff is entitled to recover.

BULLER, J. after commending the conciseness of the special verdict, and recommending it as an example in future, said,
The

The question lies in a very narrow compass; whether a proviso in a lease for twenty-one years, that it shall be void if the lessee become a bankrupt, is good in law. The defendant's counsel has commented much upon the different parts of this proviso. I cannot say whether any part of it may or may not be objectionable with reference to the statutes concerning bankrupts; we are now to decide upon the construction of a proviso at common law, and not on any statute. There is a great difference between them: Lord Chief Justice *Wilmot* took the distinction in a case before him in the Common Pleas, in which his Lordship said, where the question depends on a statute, that mows down all before it, and it acts like a powerful tyrant that knows no bounds: but the common law operates with a more lenient hand; it roots out that which is bad, and leaves that which is good. The question here is, whether this proviso is good according to the principles of the common law as to that part of it on which this question arises, namely, the act of bankruptcy, which is the only point necessary to be considered. The cases cited by the defendant's counsel have not the least analogy to the present question. That which was cited from *Equity Cases Abridged* proves nothing to this purpose. It was there taken for granted that a clause to prevent alienation by the tenant was good, but the court considered that the particular alienation in question was not within the terms of the covenant, because the covenant only extended to the act of the party, and that was an alienation in law, for the assignment was by virtue of a statute. This case has also been argued on general principles of inconvenience, because the possession of an estate on such terms enables tenants to hold out false colours to the world. But that sort of observation does not apply to the case of land; for a creditor would not rely on the bare possession of the land by the occupier, unless he knew what interest he had in it. If he were desirous of knowing that, he must look into the lease itself; and there he would find the proviso that the tenant's interest would be forfeited in case of his bankruptcy. The stock upon a farm may indeed induce a credit; but that will not govern the present case. It is next urged that this is equivalent to a proviso that the lease shall not be seized under a commission of bankrupt; the defendant's counsel having first supposed the lease to be granted absolutely for a certain term, and then that a subsequent proviso is added to that effect. Such a proviso as that

1787.

ROE
against
GALLIBR.

1787.

ROE
against
GALLIERS.

that indeed would be bad, because it would be repugnant to the grant itself; but here there is an express limitation that the lease shall be void upon the fact of the lessee's becoming a bankrupt. It is clear that the landlord in this case parted with the term on account of his personal confidence in his tenant; that is manifestly the case in all leases where clauses against alienation are inserted. The landlord perhaps relies on the tenant's honesty; or he approves of his skill in farming, and thinks he will take more care of the farm than another; and therefore he has a right to guard against the event of the estate's falling into the hands of any other person, who may not manage it so well as the original tenant. Suppose a lease were made for twenty-one years, on condition that the tenant shall so long continue to occupy the land personally; there could be no objection made to such a condition, for the personal confidence is the very motive of granting the lease; and that is like the present case. Lord *Stanhope's* case does not apply at all to this. In the first place, the court were equally divided, and therefore the case is of no authority. In mentioning this, I do not mean to say, or even to insinuate, that the opinion which I then held was right. But there is a great difference between the two cases: for there the lease was granted to the tenant, his executors, and administrators; they were to take as such, which gave rise to the doubt in that case: and Lord *Mansfield* there said, the difficulty is, that, as by the terms of the lease the executors were to take, the subsequent proviso that they should not assign seems to be repugnant to the grant itself. Again, that was not a husbandry lease for twenty-one years, like the present, but for forty-one years; and there may be great reason for a distinction between the two terms; for if such a proviso as this were inserted in very long leases, it would be tying up property for a considerable length of time, and would be open to the objection of creating a perpetuity. But the principal ground is, that this is a stipulation not against law, not repugnant to any thing stated in the former part of the lease, but merely a stipulation against the act of the lessee himself, which I think it was competent for the lessor to make.

GROSE, J.—The question is, whether the landlord may not stipulate that he will let his land only to the tenant, or to such assignee of the tenant as the landlord shall approve of. I know of no statute or case which says that such a stipulation is bad.

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The defendant's counsel has called to his assistance the 21st *Jac.* 1. but that has never been construed to extend to lands, it only relates to goods and chattels. The argument of the tenant's obtaining credit by holding out false colours does not apply to the case of land, but merely to goods; for a man does not get credit merely from the *occupation of land*, but from the *interest* which he has in it; in order to know which it is necessary that the creditor should see the lease, which, when produced, would shew that the estate would be defeated upon the tenant's becoming a bankrupt. Therefore the argument derived from the credit which the tenant is likely to get by being in possession of the land can have no weight in this case. As to the inconvenience which it has been contended will arise from establishing the validity of this proviso, it rather bears the other way; for this cannot be determined to be illegal on any principle which would not equally extend to leases which are every day granted in large towns, restraining the assignment of houses to persons exercising obnoxious trades; that not only diminishes the value of the particular house so assigned, but also the adjoining houses, belonging probably to the same landlord.

Judgment for the plaintiff.

KING, Assignee of LANGMAN, *against* LEITH.

CASE for money had and received to the use of the plaintiff, as assignee, money paid laid out and expended, money lent, and on an account stated. Plea, *Non-assumpsit*. On a motion to set aside the verdict, which had been given for the plaintiff, and to enter a non-suit, it appeared from the report of Gould, J., before whom this cause was tried at the last *Maidstone* assizes, that *Langman* the bankrupt was arrested on the 19th of *January* last at the suit of the plaintiff, and that he became a bankrupt by lying two months in prison, which expired on the 26th of *March*. On the 19th of *February* the plaintiff's attorney gave notice by a letter to the defendant, (who had been employed by *Langman* about the latter end of *January* as a broker to sell his effects) not to sell them, because *Langman* had committed an act of bankruptcy, that a commission of bank-

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1787.

ROE
against
GALLIERS.

Wednesday
Nov. 21st.

If a trader become a bankrupt by lying in prison two months after an arrest, his assignees may maintain an action for money had and received against a person, who, having notice that a commission would be issued against him, sells his goods and pays him the produce before the two months are expired.

1787.

KING
against
LEITH.

rupt would shortly be issued against him, and that the act of bankruptcy would relate to the day when it was committed, which was some time past. The defendant in his answer to this, dated the 23d *February*, said, that as he had advertised the sale and begun to sell, and the goods would not produce the sum for which *Langman* was in prison, he had thought it better to complete the sale; and that he had sold the effects without any design to defraud. On the 1st *March* the defendant paid *Langman* 120*l.* being the produce of the sale. The defendant's counsel objected, first, to the form of the action, and that it should have been trover; and secondly, that the sale and payment were good, being before the act of bankruptcy was complete. But the learned judge overruled these objections, and gave the defendant leave to move to enter up a nonsuit without costs.

A rule having been obtained to shew cause why the verdict should not be set aside, and a nonsuit entered up,

Bond, Serjeant, shewed cause; and, in answer to the first objection, cited *Hitchin and Others v. Campbell and Others* (a), which clearly establishes that the assignees have their election to bring either trover or assumpsit. Secondly, there is as little doubt upon the other point. For it appears from *Rose v. Green* (b), and *Coppendale v. Bridgen and Another* (c), that the property of the bankrupt vested in the assignees by relation from the arrest: and as the defendant paid the money over to the bankrupt after express notice of the bankrupt's situation, he cannot be protected by either of the statutes relating to bankrupts, which indemnify persons paying to, or receiving money from, the bankrupt without notice; and indeed the 19 *Geo. 2. c. 32. s. 1.* avoids payments made with the knowledge of the bankrupt's being in insolvent circumstances.

Erskine and *Mingay*, in support of the rule, insisted that the present form of action could not be maintained against the defendant, and that trover only lay in such a case; because at the time of the payment by the defendant to the bankrupt no act of bankruptcy had been committed; nor did it necessarily follow from the bankrupt's situation at that time that the act of bankruptcy would be complete, upon which a commission could be sued out. There is no case in which it has been held that money received before the act of bankruptcy is received to the use of

(a) 2 *Bl. Rep.* 827. 3 *Wils.* 304.(b) 1 *Burr.* 437.(c) 2 *Burr.* 814.

the assignees. The notice to the defendant cannot vary this case, because there was no act of bankruptcy at that time to which the notice could refer; and the statutes concerning bankrupts only speak of payments made after notice of the bankruptcy. They admitted that if the defendant had kept the money himself arising from the sale of the goods, or had paid it over to a third person, or even to the bankrupt himself, after the 26th of *March*, the plaintiff would have had an election either to bring assumpsit or trover; and then the case of *Hitchin v. Campbell* would have applied. But any time before the 26th of *March* the bankrupt might have recovered this money in an action for money had and received to his use: then the defendant was warranted in doing that voluntarily which the law would have compelled him to do. In *Coppendale v. Bridgen*, Lord *Mansfield* said "If the sheriff had returned that he had levied, &c. and had actually paid the money to the plaintiffs on the 26th (which was within the two months) the sheriff would have been excused, because it was impossible for him at that time to know that the defendant would lie two months in prison." Now in the present case the money was actually paid before the expiration of the two months; and the defendant is therefore protected according to the doctrine laid down in that case.

ASHHURST, J.—Whatever doubt may have been formerly entertained upon this question, it is now clear that the assignees of the bankrupt have an election to bring either trover or assumpsit in a case like the present. The only distinction attempted to be taken between this and other acts of bankruptcy is, that all the other acts of bankruptcy are complete in themselves, whereas this is a complicated matter and is inchoate till the party has lain in prison two months; and therefore the act of bankruptcy is not complete till the expiration of that time. But I do not think that makes any difference, for as soon as the two months are expired it relates back to the time of the first arrest, and then operates as if the arrest were a complete act of bankruptcy in itself. Then if the act of bankruptcy overreaches all intermediate acts, so as to vest the property in the assignees from the time of the act committed, it follows as a necessary consequence that they may either affirm or disaffirm the act of any party who after the act of bankruptcy has converted the trader's effects into money, either by bringing an
action

1787-

KING
against
LEITH.

1787.

KING
against
LEITH.

action for money had and received to their use, or by bringing trover; and here they have chosen the former. The statute of *George* the Second makes no difference; that only provides that no payment shall be set aside which is *bonâ fide* made to the bankrupt in the common course of trade: but this cannot be said to be a payment really and *bonâ fide* made in the common course of trade, because the defendant had express notice of the bankrupt's situation. And though, strictly speaking, at the time of the notice the act of bankruptcy was not complete, yet after that notice the defendant was not warranted in paying the money over to the bankrupt, and it cannot be called a *bonâ fide* payment.

BULLER J.—With regard to the second point: whether this be considered on the construction of the bankrupt laws, or on the cases adjudged, I have not the smallest doubt but that the bankruptcy relates to the day on which the bankrupt was arrested; and the court are bound to consider it so, and reason upon it as such. The other objection as to the form of the action seems to have been decided by the case of *Hitchin v. Campbell*, which says that the assignees have their election to bring either trover or assumpsit. But without entering into the cases upon that subject, I should be disposed to support the latter. For that is most beneficial to the defendant; because in trover the plaintiff may recover the full value of the goods though the sale may not actually have produced more than half their worth; but in assumpsit the assignees are only entitled to recover what the party really received, which is only what the sale of the goods produced. But even supposing there had not been any other case upon this subject, there could be no doubt in this case; for the letter written by the defendant in answer to one from the plaintiff's attorney is decisive that this action will lie. For first he had notice that the bankrupt was in insolvent circumstances, that he was in gaol, and that the goods did not come in to his possession till after the arrest; to which he returned for answer that, as he had advertised and begun the sale, and that the goods would not produce the sum for which the bankrupt was in prison, he had thought it better to complete the sale, and that he had sold the effects without any design to defraud. Now this is as much as if he had said, that it was most beneficial for him that the goods should be sold, but that he would hold the money for those who were really entitled to it.

GROSE,

GROSE, J.—What is admitted by the defendant's counsel is decisive that an action for money had and received will lie in this case; because these goods at the time of the sale belonged, not to the bankrupt but, to the assignees by relation back to the act of bankruptcy. So that the defendant, having sold their goods, is liable to an action for money had and received to their use; and particularly so as it appears that he had express notice of the insolvency of the bankrupt. The only distinction between trover and assumpsit is that which has been mentioned by my brother *Buller*; which is in favor of the defendant; because in an action of trover the plaintiff may recover the full value of the goods at the time when they were taken; but in assumpsit for money had and received the plaintiff considers the party selling the goods as his agent, and is entitled to recover only the sum for which they were actually sold. On both points it is equally clear that the plaintiff is entitled to recover.

Rule discharged.

1787.

KING
against
LEITH.

The KING *against* FILEWOOD and Another.

Thursday,
Nov. 22d.

ON an information being filed against the defendants (a), who were justices of the peace, for improperly granting an ale licence, *Carter* the prosecutor's attorney entered into a recognizance in 20*l.* to prosecute the information with effect, as required by the 4 & 5 *W. & M. c. 18. s. 2.* At the trial at the last assizes for *Surry* the defendants were acquitted. And the defendant's costs having been since taxed to 54*l.* a rule was obtained to shew cause why an attachment should not issue against *Carter* for not paying those costs. This application was made for the purpose of taking the opinion of the court on the construction of the 4 & 5 *W. & M.*; the second section of which enacts "that no information shall be filed till
" the prosecutor shall have entered into a recognizance in the
" penalty of 20*l.* that he will effectually prosecute such informa-
" tion, and abide by and observe such orders as the court shall
" direct; and in case the prosecutor shall not within one year
" after issue joined procure the same to be tried, or if upon such
" trial a verdict pass for the defendant, or the informer procure

On a defendant's acquittal on an information, he is not entitled under the 4 & 5 *W. & M. c. 18. s. 2.* to costs beyond the extent of the recognizance entered into by the prosecutor in 20*l.* under that act.

(a) *E. 26 G. 3. Vide 1 vol. 692.*

1787.

The KING
against
FLEWOOD.

" a *noli prosequi* to be entered, then in any of the said cases
" the court of King's Bench is hereby authorised to award to the
" defendant his costs; and in case the said informer shall not with-
" in three months next after the said costs taxed, and demand made
" thereof, pay to the defendant the said costs, then the said defend-
" ant shall have the benefit of the said recognizance to compel him
" thereto."

It was insisted in support of the rule that, though the statute limited the recognizance to 20*l.*, the court were expressly authorised by the statute to award the whole costs. The recognizance is only directed by the act as a previous security before any proceedings can be had; and the legislature saw that there might be cases in which the whole costs would not exceed 20*l.* but that part of the section does not confine the power which is given to the court in another part, which enacts "that the court is hereby authorised to award to the defendant his costs;" for they are distinct from and independent of each other. It has been the uniform practice of the Crown-office to allow the defendants all their costs under this act of parliament, without regarding the sum mentioned in the recognizance. And in the case of the *King v. Heydon* and others (a), which was an information for a misdemeanor, on a motion to tax the defendants their costs for the prosecutor's not going on to trial, Lord Mansfield said "by the constant course of the court the defendants are entitled to costs, if the prosecutor give notice of trial, and neither goes to trial, nor countermands it in time: and no instance can be produced, that I know of, to the contrary." And there it was not even doubted but that the defendants were entitled to *all the costs*.

It was admitted by the counsel against the rule that the defendants were entitled to the benefit of the recognizance; but it was contended that the court could not exceed the sum limited by the act of parliament, namely, 20*l.*; and no costs are due at common law where the prosecution is at the king's suit. Under this act of parliament the party has no means to enforce the payment of any costs within three months; after which time he is only entitled to the benefit of the recognizance to compel payment of the 20*l.* So that it is clear that the legislature did not intend to give a defendant more than 20*l.*

(a) 3 Burr. 1304.

for his costs; for it would be absurd to give him the benefit of the recognizance, which could only enforce the payment of 20*l.* if he had a better security for his whole costs by applying to this court for an attachment. And this point has been settled in the cases of the *King v. Howell* (a) and the *King v. Morgan* (b); in the first of which a rule was obtained to shew cause why the prosecutor should not pay costs for not procuring a *quo warranto* information to be tried within a year pursuant to the stat. 4 & 5 *W. & M. c.* 18. and Lord *Hardwicke* said "you cannot have a rule for what costs shall be taxed in general, for you can have no more than the penalty the recognizance extends to: but if the cause had gone to trial, you might have had your whole costs, because upon the statute 9 *Anne* judgment would be given for costs." Now the statute of *Anne* only extends to *quo warranto* informations. In the *King v. Morgan*, a similar application was made for not trying a *quo warranto* information within a year; and the court said "as here has been no verdict or judgment, it must not be costs generally, as on 9 *Anne c.* 20. but restrained to 20*l.* as on the 4 & 5 *W. & M.*" If this be the true construction of the act of parliament, no practice which may have obtained in the Crown-office since it was passed can vary the law.

Piggott and *Runnington* in support of the rule.

Erskine and *Mingay* against it.

Cur. adv. vult.

ASHHURST, J.—now delivered the opinion of the court; and said that on looking into the act of parliament, and the cases of the *King v. Howell*, and the *King v. Morgan*, the costs were limited to the sum specified in the act, namely, 20*l.* and, there being no authority to the contrary, they were not warranted in giving more than was mentioned in the recognizance. But he intimated that perhaps in future it might be proper to adopt some new rule, such as refusing to grant any information unless the prosecutor will undertake to pay all the costs (c), in case he does not substantiate his charge; but that was a matter for future consideration.

Rule discharged on paying 20*l.*

(a) *Cas. temp. Hardw.* 247. (b) 2 *Str.* 1042. (c) *Vide The King v. Jenkinson*, 1 vol. 82.

1787.

Thursday,
Nov. 22d.

If it appear by the sheriff's return of a writ of execution that greater fees have been taken for the levy than are allowed by 29 Eliz. c. 4. the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. Under that statute the sheriff cannot take any other charge except for the poundage.

WOODGATE against KNATCHBULL.

THIS action was grounded on the 29 (a) *Eliz. c. 4.* The declaration stated the recompence permitted by that act on levying execution, namely, one shilling for every pound under 100*l.* and sixpence for every 20*s.* beyond 100*l.* and forbidding any greater recompence to be taken under the penalty of treble damages to the party, and 40*l.* a moiety to the king and the other moiety to him that would sue. It then set forth a *fiery facias* for 200*l.* against the plaintiff, at the suit of *Charles Gilbert* for non-performance of promises, indorsed to levy 116*l.* besides the costs of levying and sheriff's fees, and that the defendant illegally received for executing that writ more than is limited by that act, *viz.* 55*l.* whereby the plaintiff is aggrieved 55*l.* The second count stated another *fiery facias* against the plaintiff, at the suit of *John Seldwick* for a debt of 207*l.* 17*s.* 11*d.* and costs 6*l.* 10*s.* indorsed to levy 214*l.* 7*s.* 11*d.* besides the costs of levying and sheriff's fees: and that the defendant took 19*l.* 2*s.* beyond what is limited by the said statute. The third count stated another *fiery facias* on a judgment against the plaintiff at the suit of *Thomas Hills* for 700*l.* and 3*l.* 3*s.* costs, indorsed to levy 107*l.* 3*s.* 6*d.* besides the costs of levying and sheriff's fees, and that the defendant took more, &c. *viz.* 7*l.* 19*s.* 6*d.* Plea, the general issue. At the trial before *Gould, J.* at the last *Kent* Assizes, the sheriff's returns were read in evidence, whence it appeared that on *Gilbert's* execution the sheriff had caused to be levied on the plaintiff's goods 136*l.* 12*s.* 6*d.* and had retained 20*l.* 12*s.* 6*d.* part thereof for the poundage and the necessary expences attending the levy and sale, and for the land-tax, and paid the remaining 116*l.* to the plaintiff in that suit (*Gilbert*), in full satisfaction of his damages. On the second and third writs there were the like indorsements, *mutatis mutandis.* The return to the second stated, that the defendant had caused to be levied 241*l.* 6*s.* 11*d.* and had retained 26*l.* 19*s.* part thereof for the same purposes as in the first return, and paid the residue to the plaintiff in that action. And the return to the third was of the levy of

(a) In 1 *Salk.* 331. it is said that it appears by the parliament rolls to have been passed in the 28th year of *Eliz.*

152*l.* 4*s.* 11*d.* and 13*l.* 3*s.* part thereof retained for the same purposes as in the others; but omitting the land-tax in this, and stating the payment of the residue to the plaintiff in that action, and 31*l.* 18*s.* 5*d.* the remaining surplus to the now plaintiff. It also appeared that two auctioneers had been employed by the sheriff's officers; one of them under *Gilbert's* execution, who was sent for from *Deptford*, though an auctioneer lived on the spot at *Sevenoaks*, who charged seven and a half *per cent.* and two guineas for making an inventory, but on the latter being objected to he returned one. The other auctioneer was employed by *Baker*, one of the sheriff's officers, in the other two executions, who raised 532*l.* 7*s.* 11*d.* and paid the money to *Baker*, and received for that sale 26*l.* 12*s.* and allowed four guineas to *Baker* out of that sum for acting as his clerk. The sale lasted three days, and the auctioneer admitted that he had never paid a clerk a guinea a day before.

The defendant's counsel objected at the trial that this action did not lie against the sheriff who was a stranger to and had not intermeddled with the transaction. It was not controverted however but that the officer's taking the four guineas was an offence in him against the act of parliament. The verdict was taken for 54*l.* 14*s.*

A rule having been obtained to shew cause why the verdict should not be set aside,

Erskine, Mingay, and Shepherd, shewed cause; and insisted, first, that this was extortion; and secondly, that the sheriff was liable. As to the first, extortion is defined by Lord *Coke* (a) to be "an unlawfully taking by any officer, by colour of his office, of any thing that is not due, or more than is due, or before it is due." And in 2 *Inst.* 210. it is said, "that a sheriff cannot take more for doing his office than hath been since this act (b) allowed to him by authority of parliament." Then it is necessary to recur to the statute of *Elizabeth*, to see what in strictness the sheriff is entitled to take; and that act only allows poundage. However at the trial the plaintiff did not rely on the rigor of the statute; but, in order to prevent any doubt, he had allowed one guinea for the levy money, and 2*s.* 6*d.* *per* day for the officer's keeping possession, according to the usage which was stated in *Savage v. Smith* (c) to have prevailed since the year

(a) *Co. Lit.* 368. b.(b) *Westm.* 1. c. 26.(c) 2 *Bl. Rep.* 1103.

1787.

WOODGATE
against
KNATCH-
BULL.

1694, though the legality of those charges was not there decided; and, even making those allowances, the sheriff has been guilty of extortion to the amount of the sum for which the verdict is taken. If the compensation allowed by the statute be inadequate to the trouble and risk of the sheriff in executing process, it must be remedied by the legislature: but no practice which may have obtained contrary to the act can be justified. Secondly, though the sheriff be not *criminally* responsible for the misconduct of his officers, yet for *all civil purposes* he is; and the remedy by action given by the statute to the party grieved is a civil remedy. Almost all the cases upon this subject, are collected in that of *Saunderson v. Baker* and Another (a), where it was held that trespass would lie against the high sheriff for the bailiff's taking the goods of A. instead of B. under a *feri facias*. The same point was expressly determined in *Ackworth v. Kempe* (b), where Lord Mansfield said, "for all civil purposes the act of the bailiff is the act of the sheriff." And the distinction is well laid down in *Laycock's* case (c), which decides that the sheriff shall not be imprisoned or indicted for the acts of his officers: but if it rest in damages the high sheriff is answerable. In *Tyler v. Johnson* (d) it was held that false imprisonment would lie against the sheriff for his bailiff's arresting the prisoner in one county instead of another. Then if trespass and false imprisonment will lie against the sheriff, an action for extortion may be equally maintained against him, if it be actually committed by one of his bailiffs. The relation between a sheriff and his bailiffs is in some respects similar to that between master and servant. For though the master cannot be indicted for his servant's negligently driving against another person's carriage, yet he is liable to an action on that account (e). The reason why the sheriff shall be liable at all events is, because the party who is damnified shall have an ostensible person against whom he can proceed. And there can be no hardship on the sheriff, because he takes security for the good behaviour of his officers. If the doctrine contended for by the defendant were to prevail, and one of the sheriffs of *Middlesex* were to be personally guilty of extortion, the party aggrieved could have no remedy; for, both the sheriffs being but one person in law, no action could be maintained against the one

(a) 2 Bl. Rep. 832. and 3 Wilf. 309.

(b) Dougl. 40.

(c) Latch. 187. Noy 90, S. C.

(d) Cited by Nares, J. in 2 Bl. Rep. 834.

(e) Jones v. Hart. Salk. 441.

alone who was actually guilty of the extortion, because he alone is not the sheriff; neither could the other be sued, because he was not privy to the transaction. At any rate in this particular case the defendant is liable; for he has adopted the act of his bailiff by making the return. And there cannot be any doubt but that this is a civil remedy (a); it is not an action for the penalty by a common informer, but for damages by the party grieved. The statute 29 *Eliz.* is partly remedial and partly penal; the former part giving the party grieved treble damages is remedial; so that this cannot even be called a penal action.

Bond, *Serjt. Rous*, and *Palmer*, in support of the rule, relied on these two objections; 1st. That this action could not be maintained by or against these parties. 2dly. That the acts stated to have been done did not amount to extortion in its legal signification. 1st. There is no pretence upon the letter of the act to charge the sheriff personally for the misconduct of the officer, either for the treble damages which the party may have sustained, or for the penalty, unless the sheriff himself be proved to have transgressed the act. It is true that at common law an action lies against the sheriff for the misbehaviour of his bailiffs; but this question depends on the construction of a particular act of parliament, which, being penal in its nature, must be construed strictly. The charge here against the defendant is for a crime; the remedy sought is in the nature of a punishment, and not merely a compensation to the party to the amount of his damage. To adapt a satisfaction adequate to the injury sustained is the end of civil justice; to punish the wrong and inflict a penalty beyond that satisfaction is the object of criminal justice. Now this sort of punishment is inflicted by the statute; it provides against the commission of a crime. The act is forbidden to be done on *pain and penalty*, &c. which imports a crime; and those words are applied to both the remedies. On this account the statute has enumerated most minutely all the officers against whom the remedy was intended to be given, which would have been wholly unnecessary if the remedy were not meant to be confined against the person actually guilty of the transgression. If the sheriff, as such, were at all events to be answerable, there was no occasion to have specified inferior officers; but in truth the act could only have been passed with a view of making

1787.

WOODGATE
against
KNATCH-
BULL.

(a) *Vide Acheson v. Everitt. Cowp. 391.*

them

1787.

WOODGATE
against
KNATCH-
BULL.

them liable to this ample retribution for their own acts, because the sheriff was before liable at common law for their improper conduct. All other statutes which give remedies against any officer personally, for acts done by him, enumerate the several persons whom the legislature intended to make personally liable, such as the 23 *Hen. 6.* 27 *Eliz. &c.* and it cannot be contended, on the construction of those statutes, that each of the persons therein named should be responsible for the other's acts: then why should the sheriff be liable any more than any other officer there mentioned? If the party injured wishes to pursue the sheriff, as such, for the acts of those under him, he must take another remedy. That this is the true construction of the act appears further from the nature of the remedies afforded by it. Besides treble damages, the act also enables the party grieved to sue for a penalty of 40*l.* and as he has his election which of the two remedies he will take, they must be intended to be given against the same person, as it is not otherwise expressed. But as the action for the penalty could only be brought against the person actually guilty of the extortion, so neither can the treble damages be recovered against any other. The great difficulty arises on the return of the sheriff, by which it will be contended that he has adopted the act of his bailiff. The answer to it is this; that the legislature either intended that the sheriff, as such, should not be liable at all, or that he should be liable at all events; if the former, the return will not vary the question: but that argument arises upon a supposition that he might have excused himself by a different return: that, however, would not be the case; for supposing some time had elapsed before the return of the writ in the first execution, and the party injured had recovered against the bailiff in the mean time for extortion, the sheriff could not have returned that he had taken 136*l.* in pursuance of that writ; and if he had returned that he had only levied 116*l.* that would have been false, and would have tended to preclude the party from his common law remedy. If the return made by the sheriff is to operate against him at all, it must either be taken as matter of record, or only *prima facie* evidence against him; if the latter, the sheriff is excused, because it appeared at the trial that he knew nothing of the extortion committed; if the former, it will conclude the plaintiff himself as well as the sheriff. Then it will not appear that the plaintiff has been aggrieved, for by the writ the sheriff was commanded to levy 200*l.* on *Gilbert's* execution;

cution; but on the return he states that he has levied a less sum. There might have been an agreement between the parties to levy 136*l*.; for though the writ was indorsed to levy only 116*l*. yet that makes no part of the writ itself, and is only an equitable part of the practice of the court. As this action therefore cannot be maintained against the sheriff, as such, neither can it be maintained by the present plaintiff. The mischief intended to be remedied by the act of *Elizabeth* was the negligence of sheriffs in executing process; persons who had recovered judgments being obliged to pay money to sheriffs in order to induce them to do their duty properly in levying the sums recovered. This was to be remedied by allowing the sheriff so much in the pound for the sum levied, as a stimulus to him; but to prevent him from charging the plaintiffs in the original suits with more than was allowed, the act gave the two remedies therein specified. They therefore were the only persons intended to be benefited by such pecuniary compensations, and not the defendants. Nor is the present plaintiff left without remedy, for he may sue the sheriff at common law. Or if the Court should think that he is within the provisions of the act of *Eliz.* he may bring an action against the person under that act, who actually committed the extortion. 2dly, This cannot be said to be extortion in the proper signification of the word; and if not, it will not be remedied by the act. Extortion is defined to be an illegal charge made by colour of office. *Hutt.* 53. They did not indeed defend the taking of the four guineas; but with respect to the charge for keeping possession, that was for the accommodation and by the desire of the party against whom the writ was issued, and it appears to have been a customary charge. In many instances it is absolutely necessary; as where there is a levy on growing corn. As to the guinea for the levy fee, that also seems to have been warranted by custom in the case in 2 *Bl. Rep.* 1102. and the mode of sale by auction was adopted in preference to any other in order to render the fund more productive; by which the present plaintiff himself was most probably benefited. Public sales are necessarily more beneficial to the party than private ones: however if the plaintiff disapproved of it he might have applied to the court to put a stop to it; or he might have brought his action at common law against the sheriff: but at all events these charges cannot be said to be extortion on this statute. Although by the statute no fees are allowed to be taken except the poundage,

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1787.

WOODGATE
against
KNATCH-
BULL.

1787.

WOODGATE
against
KNATCH-
BULL.

yet the barrs fee has always been taken, and has not been held to be extortion, because it was not taken for doing his office. 21 H. 7. 17. Bro. Abr. tit. Fees, pl. 6. 2 Inst. 210. The passage cited from Co. Lit. 368, b. is in favour of the defendant; for it is there said that such reasonable fees as have always been taken by inferior officers for their labour and attendance is not extortion. If the sheriff could not take any thing beyond the mere poundage, he would not be entitled to be paid for the stamps which are made necessary by several subsequents acts; but it could never have been intended that such expences should fall on him.

ASHHURST, J.—There is one general principle, which appears to be clear, that the sheriff is personally liable for every act of his bailiff. This is laid down in *Latch* (a), where it is said that the sheriff shall be answerable in damages for the act of his officers, though he is not liable to be indicted for their misconduct. It is also said in *Dougl.* (b) that “for all civil purposes the act of the bailiff is the act of the sheriff.” This holds indeed in most instances with regard to servants in general; a master is liable for every act of his servant done by him in the course of his employment. And there seems to be greater reason why that should hold in the case of a sheriff, than in the case of servants in general, as the sheriff is supposed to take ample security for the good behaviour of his officers, which is not done in other instances. The next thing to be considered is, whether the taking of any thing for executing process is or is not done by the sheriff in the course of his office: now this cannot be controverted; we have only to read the return of the sheriff, which shews not only that he adopted the act of the bailiff as his own, but also that the process was executed under his immediate order; for he says, “I have caused to be levied, &c. part whereof I have retained, &c.” Then the defendant’s counsel attempted to make this a criminal charge on the defendant: but in my apprehension this is not so, nor even to be considered as a penal action; for it has been held in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action; for in penal actions no costs are allowed, but if the action be brought by the party

(a) *Latch* 187.(b) *Dougl.* 42.

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grieved, he is entitled to costs (a). This was then argued to be a criminal charge against the sheriff, because the subject itself is of such a nature as would warrant an indictment: but that argument is inconclusive, because actions are brought every day against sheriffs for acts done by their bailiffs, which would warrant a criminal prosecution; as, for instance, trespass and false imprisonment, which may be the subject of an indictment for an assault against the bailiff. It is not necessary for us to determine, in this case, whether an action would or would not lie against the sheriff to recover the penalty given to the common informer: but were it necessary to decide it, I should think it would be difficult for the sheriff to protect himself against such an action; for by the return he recognizes the act of the bailiff as his own. And I believe there are instances which go the whole length of this position; as where actions have been brought against lottery-office-keepers for acts done by their servants. Now if such an action will lie against a lottery-office-keeper for acts done by his servant, an action may as well be maintained by a common informer to recover the penalty given by this statute: there does not appear to be much difference between the two cases; but I do not give any decisive opinion upon this point. As to the principal question, there is no doubt but that this action is properly brought against the sheriff; and there is no hardship in it against him, because he may resort to the bailiff's securities, which is more convenient to the public than that the party grieved should be obliged to sue the bailiff on his own personal security.

BULLER, J.—This being a motion for a new trial, the general question is, whether the verdict is supported by the evidence? And speaking of this case in particular, I think that the return made by the sheriff is decisive against him; for by that he has adopted the act of the bailiff as his own, and has insisted on the right to retain that sum which has been deducted by the bailiff in executing the writ. The articles are only due as fees *to the sheriff*; they are claimed by him as such; and on that account it has been held that, if an action be brought on this act of parliament for fees, it must be brought by the sheriff, and not by the bailiff. The sheriff is the only officer known to this

(a) And it has been held that an action given by statute to the party grieved is not within 31 *Elix. c. 5.* which limits the bring-

ing of actions on penal statutes. *Spiers v. Frederick*, T. 25 G. 3. B. R.

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1787.

WOODGATE
against
KNATCH-
BULL.

1787.

WOODGATE
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court; he may employ whom he pleases; but he is answerable *civiliter* for the acts of all those employed by him. And this has been carried so far, that a return made by a sheriff that the person arrested was rescued out of the custody of the bailiff has been held to be bad; the return must be, that the person was rescued out of *his* custody. So that the court look to the sheriff as the person who is immediately answerable; and here he has returned that he has levied so much, which is sufficient to charge him. On the general question I have no sort of doubt but that the sheriff must be answerable. This depends on the true meaning of an expression in the books, that the sheriff is answerable *civiliter*, but not *criminaliter*, for the acts of his bailiffs. So long ago as the case in *Latch* the line was drawn with so much precision that it does not admit of any doubt. There it is explained to mean, that the sheriff shall not be imprisoned or indicted for the acts of his bailiff, but that an action lies against him by the party grieved for damages, and he shall be fined. So that he is not liable to any corporal punishment; but where it rests in damages, he shall make the party a pecuniary satisfaction. This doctrine was recognised in the Common Pleas in the case of *Saunderson v. Baker*, where Gould, J. said (a) "As to the sheriff's liability to answer *civiliter* and not *criminaliter* for the acts of his officers, the books mean that the sheriff is not liable to an indictment." Therefore the distinction is so clear that it cannot be shaken. It is said that there is a hardship on the sheriff on account of the difficulty of his making a return; and it is first said that, if he had returned that he had levied 136*l.* that would have been wrong; I think so too. Then the defendant's counsel admitted that if the sheriff had returned that he had only levied 116*l.* that return would have been false. This shews that he is obliged to state the fact, and adopt the act of his officers; consequently that he must be answerable. Those cases put at the bar, where it might be reasonable that the sheriff should take more than is allowed by the statute, go rather to the passions than to the judgment of the court; because they are instances where the sheriff gives time as an indulgence to the party: in answer to that, I can only say that it is not the duty of the sheriff or his officers to grant indulgences. When I first came into this court numberless motions were made on account of the inconvenience arising

(a) 3 *Wils.* 316.

to the parties from this sort of indulgence. We saw that there was a collusion between sheriffs and defendants; on which the court took this line, wherever they found a sheriff taking part with the defendant, they fixed him with the whole debt and the costs upon an attachment. That put a stop to an evil which was encreasing in this court to an enormous degree. The sheriff should not consider whether delay will be advantageous to the party or not; he ought not to exercise his judgment upon it; it is his duty to obey the orders of the court, to seize and sell the goods immediately: therefore I think that the sheriff cannot be allowed the expence of an auctioneer, or even the levy fee of a guinea; but the sheriff and the court are bound by the act of parliament. If the plaintiff choose to have an auction, he must defray the expences out of his own debt to be levied; for there is no colour to charge the defendant with it. The sheriff can only levy on the defendant that sum which is given by the judgment of the court: and if the defendant wish to have an auction, he must pay for it out of his pocket; but it should make no part of the sheriff's account. Suppose the defendant's effects were but just sufficient to pay the debt, shall the defendant be permitted to employ an auctioneer, or shall the sheriff allow it? That would go in diminution of the fund out of which the plaintiff's debt is to be paid. Then the only remaining question is, whether in this case it appears that the plaintiff is the party grieved? The first execution was what struck me as a ground for this doubt. The judgment there was for 200/. Therefore the sheriff was at liberty, by the judgment of this court, to raise 200/. but no more; and the expences of levying must have been paid out of the debt. For in actions on simple contracts and judgments for a debt certain, the expences of levying must be paid by the plaintiff, and not by the defendant; so that if the sheriff over-charge, the plaintiff is the sufferer. But if the judgment be for a penalty, the plaintiff has a right to receive the whole of his debt, independent of the expences of the execution; and in those cases the defendant is the party injured by the sheriff's taking more than he ought. Now in this case the plaintiff has been illegally compelled to pay more than the sheriff had a right to take; and therefore he is the party grieved.

GROSE, J.—Two questions have been made in this case; first, as to the sheriff's right of taking fees beyond what is al-

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1787.

WOODGATE
against
KNATCH-
BULL.

1787.

WOODGATE
against
KNATCH-
BULL.

lowed by the act of parliament; and secondly, as to the propriety of bringing this action against the sheriff. First, I do not take into my consideration what either party may have prevailed on the sheriff to do for his benefit: but as a question of law this point is extremely clear. At common law no fee whatever was allowed to the sheriff; then if he be entitled to receive any, it must be by act of parliament. Now by looking into the act (a) it appears clearly to have been the intention of the legislature that the sheriff should be paid in proportion to the sum levied out of the sum levied, and that the sheriff should only levy what was really due. If this had been constantly observed, the courts would never have been troubled with complaints against auctioneers, bailiffs, and all those locusts who prey upon the estates of necessitous defendants. The present is a striking instance of the propriety of this act of parliament. Two auctioneers were called in; one from the distance of twenty-three miles, although there was an auctioneer residing upon the spot, and he charged *seven and an half per cent.*; the other employed the bailiff as his servant, and gave him four guineas for three days, although he admitted that he had never before given even so much as a guinea a day. I am clearly of opinion that in point of strict law the sheriff is not entitled to take any more than what is allowed by the statute. If the parties make any private agreement, that is a matter for their consideration, but it cannot form a part of the sheriff's demand. I am glad that this question has been discussed, because the public have suffered much injustice from not knowing what is the right of the sheriff. The next question is, whether the plaintiff can maintain this action against the sheriff? This action is not brought for the penalty, but on that part of the statute which I consider as remedial. I do not give any opinion on the point whether this action could be maintained for the penalty, though I have not much doubt on that. I am of opinion that either the original plaintiff or the defendant may be the party grieved under this statute; but in this instance the original defendant only is the party grieved. Then is the sheriff answerable? It has been said that the sheriff is not the hand receiving the money in this case: but it is so according to his return; for he says that he has received and retained so much; and I think in this remedial action he ought to be so considered. But without regarding the return in

(a) 29 Eliz. c. 4.

this particular case, as a general question I think the sheriff is liable. The law on this subject is very well laid down in *Latch*, and in *Saunderson v. Baker*. In the latter case an action was brought against the sheriff for a tort committed by the officer against his warrant. There the officer did not do what he was ordered to do by the sheriff, for he took the goods of *A.* instead of *B.*; and even there the sheriff was held liable for the act of the officer, though against the tenor of the writ, and without his authority or knowledge. Then how can we say that in a case like this the sheriff shall not be liable? It has been said that there will be a hardship on the sheriff: but I think that the hardship is on the other side. For if the sheriff be not liable, the party can only have recourse to the bailiff, who is unknown to him, but who is well known to the sheriff; and therefore the sheriff knows his security, but the party does not. On the merits of the case I am likewise of opinion that the defendant is not entitled to a new trial.

Rule discharged.

Erskine then moved that treble damages of the sum recovered might be awarded; which was ordered accordingly.

MADDON on the several Demises of JOHN BAKER and Others, Executors of JOHN BAKER deceased, and THOMAS ABLEY the Younger, *against* GEORGE WHITE, SARAH WHITE, WILLIAM ASMORE, and EDWARD TAYLOR.

Thursday,
Nov. 22d.

EJECTMENT for certain premises at *Hartlebury* and *Elmbridge, Worcestershire*, tried before *Thomson*, B. at the last *Worcester* Assizes. The plaintiff relied on the title of *Thomas Abley* only, who had married *Ann Best* the daughter and heir at law of *John Best* who died seised of a house and land, the premises in question, several years ago, leaving an only child *Ann*, now the wife of *Thomas Abley* the lessor of the plaintiff, and a widow, who is since married to the defendant *Edward Taylor*. *George White*, father of the defendant *George White*, entered upon the house and land about 16 or 17 years ago as tenant to *John Best*, and died about half a year ago, having before his death delivered up the possession to the defendant his son. The defendant *Taylor*, as tenant to the defendant *George White*

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. If an agreement, made by an infant, be for his benefit at the time, it shall bind him.

1787.

MADDON
against
WHITE.

White, now occupies the house. The defendants insisted that the defendant *George White* was tenant of the premises under an agreement on 30th of *January* last, to which *Abley* the lessor of the plaintiff was a party, and that no notice to quit had been given. It was insisted by the plaintiff's counsel that *Abley* being under age was not bound by the agreement. The defendants' counsel answered that the agreement of the infant was only voidable, and that he could not avoid it before he came of age; or if he could, yet that notice of his intention of avoiding it ought to have been given. And also that the demise in the declaration was improperly laid; being laid on the 3d *January*, to hold from the 2d, which was prior to the agreement between *Abley* and *White*. The learned judge overruled these objections to *Abley's* title to recover, and the jury found a verdict for the plaintiff against the defendants *George White* and *Edward Taylor* for the premises in their possession: but no evidence having been given with respect to the premises in the possession of the defendants *Sarah White* and *William Asmore*, the jury found for those defendants.

Plumer had obtained a rule to shew cause why a new trial should not be granted on several grounds. 1st, Because it appeared that the agreement for a lease to the defendant, entered into by the infant lessor, was rendering rent, and therefore it was not void *ab initio*. 2dly, If it were only voidable, it was not avoided by any act of the infant before the bringing of the ejectment; and if that circumstance alone would in general be sufficient to determine a voidable lease, yet the infant could not avoid it while he was under age, it being for his benefit. 3dly, The plaintiff claims under a demise in the declaration made by the infant, for which no consideration is stated; but a demise made by an infant without reserving rent is absolutely void and not merely voidable (a). 4thly, Even supposing the agreement to be voidable by the infant, and that a lease made by him merely to try his title is good without reserving rent, yet the lessor of the plaintiff is not entitled to recover in this ejectment, because the agreement in fact subsisted posterior to the day of the demise laid in the declaration.

Bearcroft shewed cause. The lease of an infant even rendering rent is voidable by him at any time, *Co. Lit.* 380. b. when it

(a) It is laid down in *Zouch d. Abbot* | an infant may make a lease without reserv-
and *Another v. Parsons*, 3 *Burr.* 1806. that | ing rent to try his title.

is said that a diversity is to be observed between matters of record done or suffered by an infant, and matters in *fact*; for matters in *fact* he shall avoid either *within age* or at full age: and in 2 *Inst.* 673, it is held that if an infant bargain and sell lands by deed indented and inrolled, he may avoid it at any time. That is much stronger than the present case, which is only that of a parol demise. Then if it may be avoided, the act of bringing an ejectment will determine it.

Per Curiam. It is decisive in this case that six months notice has not been given. For even supposing the agreement made by the infant to have been avoided, the parties must stand in the same situation in which they did before that agreement was entered into. At that time the defendants held as tenants from year to year under a letting by the father, who could not have turned them out without giving them regular notice: then they were not less entitled to the same notice when the lands came to the daughter's husband, because he was an infant. And

BULLER, J. added—Notwithstanding the doctrine in *Co. Lit.* which is also laid down in *Brownlow*, I will freely own that I am of opinion against the lessor of the plaintiff on the other ground; for all the modern cases have expressly held that an infant cannot avoid a lease which is for his own benefit. In the argument of the case of *Zouch and Parsons*, Mr. Dunning who was arguing against the deed of the infant says, “as to the infant's lease, the benefit of the infant is to be considered. His leases are good if rent is reserved for them: this exception arises from necessity; therefore it is necessary to validate his leases reserving rent.” And Lord Mansfield in the case of *Drury and Drury* (a) laid it down as a general principle, that if an agreement be for the benefit of an infant at the time it shall bind him; Lord Hardwicke afterwards adopted this rule.

Rule absolute.

(a) *Dom. Proc.* 26th. May 1762. 5 *Bro. Ap.* 570.

ANDREE and Others *against* FLETCHER.

Friday,
Nov. 23d.

THIS was an action on a policy of insurance, tried at the Sittings after Trinity term 1787, at Guildhall, London,

Every re-
insurance in
this country
either by Bri-

ish subjects or foreigners, whether on *British* or foreign ships, is void by 29 *Geo. 2. c. 37.* unless the assurer be insolvent, become a bankrupt, or die.

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1787.

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before Grose, J. when the jury found a verdict for the plaintiffs damages 315*l.* subject to the opinion of the court on the following case.

James Simandy of *Marseilles* in *France*, on the 8th day of *August* 1780, subscribed a policy of assurance at *Marseilles* on a ship called *La Vierge des Carmes* and *Les Ames au Purgatoire*, *Cipriano Moresco*, master, at and from *Marseilles* to *Carthagera*, for 7200 livres or 315*l.* at a premium of 8*l.* per cent. The defendant on the 26th *August* 1780 subscribed the policy stated in the declaration at a premium of 2 guineas per cent. for the said sum of 315*l.*, being a re-assurance of the said *J. Simandy's* subscription to the first mentioned policy. The ship on her voyage from *Marseilles* to *Alicant* and *Carthagera* was captured by an *English* privateer on the 14th of *September*, and carried into *Mabon*, and there condemned as prize; and *Simandy* on the 15th of *February* 1781 paid the sum subscribed by him at *Marseilles* to the assured. *Simandy* is living; and at the time of the subscribing of the policy stated in the declaration he was solvent. The question for the opinion of the Court is, Whether the plaintiffs are entitled to recover?

Baldwin, for the plaintiffs, contended that the re-assurance effected under the circumstances of the present case was legal. Previous to the passing of the statute 19 *Geo. 2. c. 37.* there could not be any pretence to impeach the legality of such a contract. Nor is it affected by that statute; for that was passed in order to regulate insurances on ships belonging to the subjects of *Great Britain*. It appears not only by the title, but also by the preamble, of that act, that it was not meant to extend to foreign vessels. Re-assurances are allowed in all the other commercial countries in *Europe*; and it is of infinite benefit to this country that it should be permitted here on foreign ships. It has never yet been decided that a re-assurance on a foreign ship is illegal under the 19 *Geo. 2.* but it has been determined that that statute does not prohibit insurances on foreign ships "interest or no interest." *Tbellusson v. Fletcher*, Dougl. 301.

Law, for the defendant, contended that this policy of assurance was void within the 19 *Geo. 2. c. 37.* as a re-assurance. A re-assurance is a contract of indemnity between the original and a collateral insurer, by which the first is indemnified by the latter from the risk he has undertaken in respect of the subject insured. It is a partial substitution of the second in the place of the first. This cannot be said not to be within the real meaning

meaning of the statute 19 Geo. 2. c. 37., because not within all the exceptions which the act takes notice of. For in case of a *French* insurance, though the underwriter may die or become insolvent, he cannot become a bankrupt within the *English* description of that character; neither can an underwriter residing in *Scotland*; so that re-assurances of *Scottish* subscribers must be good if this is; and re-assurances of *Scottish* ships would be equally good with those of *French*. The consequence of such a rule of interpretation would be that every prohibitory statute, containing exceptions in favor of particular classes of subjects, could not possibly extend to foreigners, because such foreigners could never come within the benefit of the exception. He admitted that the case of *Tbelluffon v. Fletcher* had decided that the first section of this statute does not apply to the case of foreign ships, and that insurances "interest or no interest" may be made upon them. But that clause is qualified by words of reference to *his majesty's ships, or ships belonging to his subjects only*: but no such reference is contained in the fourth section, which prohibits *re-assurance generally*. Besides it is said that foreign ships were not included in the first section, on account of the difficulty of procuring witnesses to prove the interest: but that difficulty does not affect the general prohibition of re-assurances. This is likewise void, it being "by way of gaming or wagering:" and these are distinct substantive words independant of the ship and goods. The object meant to be prohibited by the act is a species of gaming; it was intended to deter people from adventuring in insurances upon the chance of a rise and fall of the premium; and the mischief is equal whether the gambling be effected by means of an *English* or *French* re-assurance. It is always open to frauds; and in the present instance there is a difference of premium between eight pounds received by *Simandy* and two guineas received by the defendant. This re-assurance is also void, as being a species of partnership insurance in fraud of the provisions of the 6 Geo. 1. c. 18. which was passed in favor of the *Royal Exchange* and *London Insurance Companies*; and it is likewise a gaming policy within the 14 Geo. 3. c. 48.

Baldwin in reply. The statutes 6 Geo. 1. c. 18. and 14 Geo. 3. c. 48. are not applicable to the present case. The former was made in favor of a corporation, declaring that no other persons should insure *as a body*. And the latter was passed for the purpose

1787.

ANDREE
against
FLETCHER.

1787.

ANDRE
ag-*inst*
FLETCHER.

pose of prohibiting insurances on lives where the party has no interest; and there is an express exception as to insurances *on ships*. If a foreigner can insure "interest or no interest," it is decisive of this question; and the inserting in the policy that it was a re-assurance cannot make any difference. Should the court determine that foreign risks cannot be re-assured here, it must put a stop to the practice of receiving premiums here, which has been found to be very beneficial to this country.

ASHHURST, J.—There is no doubt in this case upon the words of the act of parliament; the fourth section of which is precise and positive "that it shall not be lawful to make re-assurance, unless the assurer shall be insolvent, become a bankrupt, or die." Now in this case this is not a re-assurance made abroad, but in this country; such a contract therefore is void being in the very teeth of the act. It has been argued that, because the prior part of the statute, which restrains insurances "interest or no interest," has been held not to extend to foreigners, this clause should also be confined to insurances on *English ships*. The case of *Tbelluffon v. Fletcher* was rightly determined, because the first section is expressly confined to assurances *on ships belonging to his majesty, or any of his subjects*: but the fourth clause is general without any reservation, and reaches the present case; and there is no reason why it should be restrained to *English ships*.

BULLER, J.—This is so plain a case that attempting to argue it only tends to puzzle the question. It has been argued that, because one clause of this statute does not extend to foreign ships, the others shall not: but, if in the same act of parliament there is one clause which applies to a particular case, and another which is conceived in general terms, the former shall not restrain the signification of the latter. But it rather operates the other way; for it shews that the legislature had both cases in their view at the time of passing the statute, and when they meant to confine the prohibition to *British ships* they have expressly done so; but where they did not intend to confine it, they have omitted the restriction. And indeed other parts of the act shew that the legislature turned their attention to different cases which might arise in the course of trade; for they afterwards speak of insurances upon goods coming from any of the *Spanish or Portuguese dominions*, which may be effected "interest or no interest." That exception

was

was added for the purpose of encouraging the trade with *Spain* and *Portugal*, which was in favor of this country; and I have heard Lord *Mansfield* say that the reason of that allowance was to favor the smuggling of bullion from those countries, which was prohibited to be exported from thence; and the persons, to whom it might be consigned here, could not tell by what vessels or at what time it might be sent, as their correspondents abroad were obliged to watch the opportunity of exporting it. It has been urged as a reason for allowing the legality of such a contract as the present, that there is no instance in which a re-assurance by a foreigner on a foreign ship has been held to be bad. In truth it has never been made a question till now, which is decisive against the plaintiff; because if, as has been said, these re-assurances have frequently been made, losses must have happened; and no attempt having been made to enforce these contracts it shews what the general understanding of the parties making them has been. It cannot be said that this act of parliament does not extend to a foreigner insuring here; because all persons who make contracts in this country are bound by the laws of it. Then the question is, whether this sort of property is or is not allowed to be insured here within this act. Now no reason can be assigned, why a foreigner might insure here, which would not extend to the subjects of this country. But it cannot be contended that, if a subject insured on a foreign ship, he might re-assure here; for no person can re-assure in this country except in one of the three instances mentioned in the act. Then as to the policy of this statute, this very case is decisive in it's favor. For first there is an insurance in *France* at a premium of 8*l.* per cent. and then the *Englishman* re-assures for two guineas per cent. So that the latter runs the whole risk for the smaller sum, while the former runs no risk whatever for the larger one; and the difference is put into the pocket of the foreigner.

GROSE, J.—When this case was reserved at the trial, it struck me as scarce admitting a doubt. This matter is perfectly well understood by foreigners; they consider it as an engagement of honor. Now they come here to know what the law is; and it is perfectly clear that this re-assurance is void by the act.

Postea to the defendant.

1787.

ANDRE
against
FLETCHER.

1787.

Friday,
Nov. 23d.

A father may bring an action of trespass for breaking, &c. his house, and debauching his daughter, *per quod servitium amisit*, though the daughter be above 21 years of age, where acts of service are proved, though there be no contract for service. Licence to enter the plaintiff's house, if pleaded, is a bar to this action; but it cannot be given in evidence under the general issue.

BENNETT against ALLCOTT,
TRESPASS for breaking and entering the plaintiff's house, debauching his daughter (describing her as a menial servant), and getting her with child, *per quod servitium amisit*. Plea, Not-guilty. At the trial at the last *Hereford* Assizes, before *Perryn*, B. it appeared that the defendant, who was a collector of the land-tax, visited the plaintiff's daughter in the character of a suitor, but at the time when his entering the house was proved in order to support the trespass he went to demand payment of the land-tax, when, the plaintiff being from home, his wife invited the defendant to go into the daughter's bed-chamber, where she was lying upon the bed, and left them together for several hours. It likewise appeared that the plaintiff was a considerable farmer, and that his daughter, who was thirty years of age, occasionally did acts of service. The jury gave a verdict for the plaintiff with 200 *l.* damages; which the learned judge thought were not excessive.

A motion was made to set aside this verdict, first, because the damages were excessive; and secondly, that the action could not be maintained, the daughter being above the age of 21, and no contract for service having been proved.

Bearcroft was to have shewn cause against the rule: but the court desired first to hear

Lane in support of the rule. First, supposing the action can be maintained, the damages are excessive. It was in proof at the trial that the very injury of which the plaintiff complains was occasioned by the act of the plaintiff's wife, by inviting the defendant into her daughter's bed-chamber, and leaving them together for a considerable time. And it has been repeatedly determined in actions for criminal conversation that, if the act complained of be with the husband's privity, the action will not lie (a). This doctrine was recognized in the cases of *Worsley v. Bisset* (b), and *Foley v. Lord Peterborough* (c). And though the act in the present case might not perhaps have been committed by the connivance of the plaintiff's wife, yet if it were reasonably induced by her conduct, it will go in diminution

(a) Vide *Buller's N. P.* 27.
after *Hil.* 1782.

(b) *Sittings at Westminster*, cor. Lord Mansfield,
(c) *E.* 25 G. 3. B. R.

of damages. But, secondly, this action will not lie. This is not an action on the case for the consequential damages where the *per quod* is the gist of the action, but trespass for the immediate injury. Now if the trespass for breaking and entering the plaintiff's house fall to the ground, that which is a consequence must necessarily fall with it. It was proved that the defendant entered the plaintiff's house as a collector of the land-tax, therefore his entry was lawful, and his continuing there was at the request of the plaintiff's wife; this would have supported a plea of licence, and evidence of it is good under the general issue. *T. 21 H. 7. p. 28. pl. 5.* At any rate there was no trespass proved by the facts given in evidence at the trial. But even supposing a trespass to have been proved, still as the daughter was above 21 years of age it was necessary to prove a special hiring and service; for after the daughter became of age the father was not bound to maintain her. And though in *Postlethwaite v. Parkes* (a) it was contended that the action did not lie because the daughter was in the service of another, yet it does not follow in this case that, because the plaintiff's daughter lived in his house, this action can be maintained, as no contract of hiring was proved. But this daughter was *sui juris* at the time; therefore the injury, if any, is done to her. And there is no instance in which it has been determined that the father may recover in an action under circumstances similar to the present. For though in the case of *Tullidge v. Wade* (b) the daughter was thirty years of age, the objection was not taken.

ASHHURST, J.—It is true indeed that the damages are considerable; and if we had been on the jury, we possibly might have been disposed to have given a smaller sum. But in an action for this species of injury, the court will not try that fact; the Judge who tried the cause having declared himself satisfied with the verdict.

BULLER, J.—An action merely for debauching a man's daughter, by which he loses her service, is an action on the case. But according to Lord Holt's opinion (c), where the offence is accompanied with an illegal entry of the father's house, he has his election either to bring trespass for the breaking and entering, and lay the debauching of the daughter and loss of her service as consequential; or he may bring the action on the case

(a) 3 Burr. 1878.

(b) 3 Wils. 18.

(c) 2 Lord Raymond 1032.

merely

1787.

BENNETT
against
ALLCOTT.

1787.

BENNETT
against
ALLCOTT.

merely for debauching his daughter, *per quod servitium amisit*. In the present case the plaintiff has made his election, and has brought an action of trespass for breaking and entering his house, and all the rest is merely consequential. And therefore it is true, as was said, that if the trespass had not been proved, the defendant would have been entitled to a verdict. But it is now perfectly clear that a licence to enter cannot be given in evidence under the general issue. The plea of "not guilty" only goes to deny the fact of the trespass; now as that was proved in fact, the plaintiff was entitled to a verdict; and the only consideration for the jury was as to the quantum of damages. And indeed upon the whole the damages are not excessive; because though the mother acted indiscreetly, yet the defendant was certainly very culpable. He was introduced to the plaintiff's family in the character of a suitor; he gained admission into the house on honorable terms, and the family trusted to his honour; and therefore this is not like the case of *Worsley v. Bisset*. With respect to the objection that this action cannot be maintained by the father for debauching his daughter above age *per quod servitium amisit*, no contract for service having been proved; I take it to be perfectly well settled since the case of *Postlethwaite v. Parkes*, that the action will not lie by the father, unless the daughter be proved in some way or another his servant. In that case the ground, which influenced the opinion of the court, was, that the daughter was in the service of another person. But in actions of this kind the slightest evidence is sufficient; even milking cows. Here instances of actual service were proved, and therefore it is immaterial whether the daughter was of age or not. Neither is it material whether the servant be or be not hired for a year, or whether she has any wages; it being sufficient that she is a servant *de facto*. If this had been an action on the case, this objection could not have prevailed; and much less can it in this form of action.

GROSE, J.—declared himself to be of the same opinion.

Rule discharged.

1787.

FAIRTITLE, on the several Demises of MYTTON and Others, *against* GILBERT and Others.

Friday,
Nov. 23d.

THE defendants were nominated trustees under the 11th Geo. 3. c. 87. for repairing and widening the road between *Cheadle* and *Leek*, in the county of *Stafford*, and for other purposes therein mentioned. The trustees are authorised by the act to erect turnpikes and toll-houses; and the right and property thereof, and all the materials of the same, are thereby vested in them. And seven or more of them are enabled by writing under their hands and seals to *lease the said tolls*. And they are further authorised to take up at interest any sum *upon the credit of the said tolls*, and to assign over and convey the said *respective tolls* to any persons who shall advance their money thereon. It is further enacted that *no preference* shall be given to the person lending money on the credit of the said tolls, *in respect of the priority of advancing such sum*; but that all persons, to whom such respective mortgages or assignments shall be made, shall be in their several proportions *creditors on the said respective tolls in equal degree one with another*; and this to be deemed a public act. The trustees having occasion to raise a certain sum, advertised according to the act; and the lessors of the plaintiff having offered to supply them, mortgages were executed to the lessors of the plaintiff of the tolls, *and also of the toll-houses and toll-gates*, by a sufficient number of the trustees, some of these very defendants having joined in executing those conveyances. This ejectment was brought to recover possession of the toll-houses and toll-gates, pursuant to the terms of the mortgage to *Mytton*. At the trial before *Perryn*, B. at the last Assizes at *Stafford*, it was objected on behalf of the defendants, that the act did not warrant them to mortgage the *toll-gates*, but only the *tolls*, for which an ejectment would not lie; and that the act expressly directed that no preference should be given to any of the creditors above the rest: and the Judge being of that opinion, nonsuited the plaintiff. A motion was made to set aside this nonsuit, on two grounds; 1st, That some of the defendants having joined in executing the conveyance, were estopped from taking that objection. 2dly, That the toll-gates are a part of and ap-

The trustees of a public turnpike act, which empowers them to erect toll-houses and mortgage the tolls, and which declares that there shall be no priority among the creditors, have no power to mortgage the toll-houses or gates. If in fact they have made such a mortgage, and an ejectment is brought against them by the mortgagee, they are not estopped by their deed from insisting that the act gives them no such power.

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purtenant

1787.

FAIRTITLE
against
GILBERT.

purtenant to the tolls, and virtually included in a grant of the latter.

Leycester shewed cause against the rule, upon the two grounds on which it had been moved. 1st, The act in words only gives the trustees a power to mortgage the *tolls*, and not the *toll-gates* or *houses*. Then the question is, whether the legislature intended to give them that further power? Now it is clear that they did not, for they expressly enact that no *preference* shall be given to any one creditor above the rest; but if the trustees could mortgage the toll-gates to any particular creditor, it would be giving him a preference. Again, the trustees have a power by the act of moving the gates when they see proper, which they could not do if they gave up the possession of them. If therefore the trustees, as well by the words as by the clear intention of the act, had no power to make a mortgage of the *toll-gates* and *houses*; the second question is, whether or not the trustees were estopped from taking that objection against the terms of their own deed. In general it is true that no person can object against his own deed, that he had no right to execute such a conveyance; but that is only to be understood in the case of private individuals. Here these defendants are trustees under a public act of parliament for other creditors besides *Mytton*, and in respect of such creditors the trustees may well take such an objection: it is the same as if the objection had come from those creditors.

Bearcroft, Bower, and Caldecot, contra. It necessarily follows that the trustees must have a power of mortgaging the toll-gates if they may mortgage the tolls, because it is the only means of effectuating the conveyance. As to there being no preference among the creditors, *non constat* that there any other creditors; but supposing that there are, this manifest injustice would follow from putting the last creditor upon an equal footing with the first; that after a man has lent his money upon what he considers as a good security at the time, the trustees would have it in their power to lessen that security by afterwards mortgaging the tolls for more than their worth. Besides, if there are other creditors, the plaintiff will not be precluded from recovering in this ejectment, because the creditors may be considered as tenants in common, and answerable to each other. But the other ground is decisive, that those trustees who joined in this conveyance cannot take this objection, even if the others could.

could. If by their act any other creditors are injured, these latter have their remedy against those trustees who have exceeded their authority.

1787.

FAIRTITLE
against
GILBERT.

ASHHURST, J.—It is clear that the trustees under this act of parliament had no power to mortgage the *toll-houses* or the *turnpike-gates*. The act expressly gives the trustees power to mortgage the tolls; but the reason why it does not give them a farther power is because no creditor is to have a preference. Now if any creditor had a power to enter and take possession of the toll-gates, he would gain a priority which the act has denied. And it is very fit that this should not be taken out of the hands of the trustees; because they are trustees for all the creditors, and were considered by the legislature as the most proper persons to have the whole management of every thing to be done in pursuance of the act. It was foreseen that the whole sum wanted would not be advanced by any one person; and therefore, for the encouragement and security of all persons who were willing to advance money, it was necessary that the collection of the tolls should remain with the trustees. As then the trustees had no power to mortgage the toll-houses, the next question is, whether they are estopped to say so. In general the party granting is estopped by his deed to say he had no interest: but that general principle does not apply to this case, where the trustees were not acting for their own benefit, but for the benefit of the public; and it would be hard that other creditors, who are not parties to the deed, should lose the benefit which the act has given them. Besides, there is a still farther reason why the trustees should not be estopped; for this is a public act of parliament, and the court are bound to take notice that the trustees under this act had no power to mortgage the toll-houses. This deed therefore cannot operate in direct opposition to an act of parliament, which negatives the estoppel.

BULLER, J. and GROSE, J.—of the same opinion.

Rule discharged.

ATKINSON

1787.

Friday,
Nov. 23d.ATKINSON *against* MATTESON and Others.

A bailiff who has arrested a prisoner on mesne process may retake him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest. Where a declaration for false imprisonment against *A.* and *B.* contained two counts, to both of which the defendants pleaded not guilty, and justified the first under mesne process, *A.* as the plaintiff in that action, and *B.* as the bailiff; and the plaintiff, by a new assignment, admitting the arrest to be lawful, replied that *B.* with the consent of *A.* voluntarily released him and that they afterwards imprisoned him for the time mentioned in the first count; the plaintiff having failed in proving the new assignment, by not shewing the consent of *A.* shall not be permitted to prove the same trespass against *B.* under the other count.

THIS was an action for an assault and false imprisonment by the plaintiff against three defendants. The declaration contained two counts; to which all the defendants pleaded generally not guilty. And the two defendants, *Thomas Matteson* and *Waite*, further pleaded to the first count of the declaration, that at a court of record holden at *Hull*, on the 20th of *November*, 1784, before *Henry Broadly*, Esq. then mayor, &c. the defendant *Thomas Matteson*, as executor of *John Matteson* deceased, levied his plaint against *John Atkinson*, the now plaintiff, and one *Thomas Atkinson*, in a plea of debt for 140*l.* the same being a cause arising within the jurisdiction of the court; and, that such proceedings were had thereupon, that afterwards, at the same court of record, there issued out of the same court a certain writ or precept of our lord the now king against the said *Thomas* and *John Atkinson*, directed to the defendant *John Waite*, whereby the said defendant *John Waite*, as bailiff, was commanded to take the said *Thomas* and *John Atkinson*, if, &c. and them safely keep, so that, &c. at the then next court of our lord the king, to be there held next after the execution of that precept, to answer to the said *Thomas Matteson* on the plea aforesaid; which writ was delivered to the said *John Waite* to be executed in due form of law. By virtue of which writ, the said *John Waite* did arrest the said *John Atkinson*, the plaintiff, and detain him in custody for a time mentioned in the first count of the said declaration.

To this plea the plaintiff, admitting the arrest as stated in the plea, replied, that *John Waite*, with the consent of the said *Thomas Matteson*, the plaintiff in that suit, voluntarily released the said *John Atkinson* from the said arrest, and permitted him to go at large; and that the defendants, *Thomas Matteson* and *John Waite* afterwards again imprisoned him for the time mentioned in the first count of the said declaration. To which new assignment the said *Thomas Matteson* and *John Waite* pleaded not guilty.

the new assignment, by not shewing the consent of *A.* shall not be permitted to prove the same trespass against *B.* under the other count.

This cause was tried at the last assizes held for *Kingston upon Hull*, when a verdict was given for the defendants *Matteson* and *Jackson*, and for the plaintiff against the defendant *Waite*, damages one shilling, subject to the opinion of this court on the following case;

1787.

ATKINSON,
against
MATTESON.

That the defendant *Waite*, by virtue of the process stated in the second plea, arrested the plaintiff on the 20th November 1784, and detained him in custody all that night; but the next day the said *Waite*, at the request of the now plaintiff *John Atkinson*, but without the consent or knowledge of *Thomas Matteson*, the plaintiff in that suit, permitted him to go at large, and that he remained at large till the 23d of the same month, on which day the defendant *Waite*, without any other process, took the plaintiff *John Atkinson* to the common gaol, and delivered him to the common gaoler there, with the process under which he was first arrested and which was not then returnable. And the plaintiff *John Atkinson* continued in prison upon that process until he gave bail. The question for the opinion of the court is, Whether the defendant is entitled to recover against the defendant *Waite*?

Lowndes for the plaintiff. Although the plaintiff failed in charging the defendant *Matteson*, because his consent to the discharge was not proved, yet there was enough proved against the defendant *Waite* to make him a trespasser, because the escape was voluntary in him. The plaintiff in trespass against two may prove what is sufficient to charge one defendant, without proving all the circumstances which were necessarily alleged to charge both. In *Pallant v. Roll* (a), an action was brought against the defendant as a dissolute person for trespass: and though it was determined that the defendant was not a dissolute person within the meaning of the 4 & 5 W. & M. c. 23. so as to entitle the plaintiff to the costs, yet it was held that the plaintiff might recover upon that declaration as for a common law trespass. Now in the present case it was necessary to state *Matteson's* consent to the discharge, in order to charge him, but as it was not necessary as against *Waite* it need not be proved against him; and then this verdict may be maintained on the new assignment for the second arrest. But supposing the plaintiff bound to prove the allegations in the new assignment even as against *Waite*, still he may resort to the second count, and apply the evidence to

(a) 2 Bl. Rep. 900.

1787.
 ATKINSON
 against
 MATTESON.

that; for to that there is no justification, and there is one act of trespass proved, if the retaking were unlawful. That the retaking cannot be justified is clear, because a bailiff who has voluntarily permitted a prisoner to escape cannot retake him. There is indeed a distinction between a *permissive* and a *voluntary* escape; but the present case states that *Waite* permitted the plaintiff to go at large; and this makes it a voluntary escape. In *Ridgeway's* case (a) it was held that if the sheriff voluntarily suffer a prisoner to escape, he cannot retake him. And though that was the case of an escape in execution, which may be different from an escape on mesne process as between the original plaintiff and the bailiff, because in such case it is sufficient if the prisoner be forthcoming at the return of the writ; yet that makes no difference as between the gaoler or bailiff and the prisoner; for after the bailiff has arrested the prisoner, his warrant is executed, whether it be an arrest on mesne process or in execution; and if he afterwards permit him to go at large, he commits a tort, which he cannot purge by his own act. In *Ravenscroft v. Eyles* (b), it was held that an action lay by the plaintiff in the original action for suffering the prisoner to escape on mesne process. In *James v. Pierce* (c), *Hale*, Ch. J. said, that where the original plaintiff might maintain an action of escape against the gaoler, after a voluntary escape, the prisoner might maintain trespass and false imprisonment against the gaoler for retaking him. And in the case of *Featherstonhaugh v. Atkinson* (d), where a prisoner on mesne process had been voluntarily suffered to escape, and the plaintiff had charged the prisoner with a *ca. sa.* as a prisoner in custody, and the keeper of the compton had afterwards retaken him without any warrant, the court discharged him on motion.

S. Haywood for the defendant. Supposing the retaking to be unlawful, it cannot be given in evidence on this record. Not on the new assignment, because that states a trespass by two, and the evidence goes to prove a trespass by one only; and the consent of the original plaintiff is a material allegation which goes to the whole of the new assignment. Neither can it be given in evidence on the second count, because the new assignment has appropriated this retaking to the first count; and having given the act in evidence on one count, he cannot afterwards

(a) 3 Co. 52. b.

(b) 2 Wils. 295.

(c) 1 Ventr. 269.

(d) Barnes, 373.

1787.

ATKINSON
against
MATTESON.

give the same act in evidence upon another. But the retaking was lawful, because it was before the return of the writ, which distinguishes it from the cases cited; for they are either cases of voluntary escapes in execution, or after the return of the writ. But a bailiff, after arresting a prisoner on mesne process, may suffer him to go at large till the return of the writ, or he may keep him in a private house till that time. 3 *Bl. Com.* 290. 1 *Salk.* 408. And the sheriff of *Nottingham's* case. *Noy* 72. Besides this is an action of trespass and false imprisonment by the party himself, who has had an indulgence granted to him, against the person who granted him that indulgence, and therefore it cannot be regarded in a favourable light. If a bailiff cannot permit a prisoner on mesne process to go at large, the prisoner himself should not take advantage of the permission of the other; if he do, he is a wrong doer, and then he cannot bring an action on his own tort against any other person for the same act.

Lowndes in reply. This action is several as well as joint, and the plaintiff has made his election to consider this as a several trespass; and there being sufficient evidence to charge the defendant *Waite*, the plaintiff is entitled to retain his verdict against him, though he failed in proving the consent of the defendant *Mattefon*: but that was a distinct allegation and not connected with the charge against *Waite*. And notwithstanding the release was an indulgence in the bailiff, yet that indulgence cannot be justified, because it was against his duty. As to the writ's not being returned, that makes no difference, for it was actually executed on the first arrest. When the return is to be made on a particular day, there perhaps the bailiff at his risk might suffer the prisoner to go at large till the return: but in the present case the day of the return is indefinite, and the arrest was complete, and the writ executed in the first instance: if it were otherwise, the bailiff would have it in his power to delay making the return in *infinitum*, for he is commanded by the writ to have the body of the prisoner at the court to be holden next after the execution of the precept. Then it has been argued, that the plaintiff was a wrong doer, and that he cannot take advantage of his own wrong: but he cannot be considered in that light, as he was permitted to escape.

ASHHURST, J.—We cannot travel out of this case; and the point in this case is as to the defendant *Waite*. It is not neces-

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1787.

ATKINSON
against
MATTESON.

fary for us to decide how far the plaintiff might or might not have availed himself of the defendants' not proving their allegation, namely, that he was released with the consent of *Mattefon*, if our opinion is that, on all the facts disclosed, though this was a voluntary escape, the defendant is not guilty of false imprisonment by retaking the plaintiff before the return of the writ, and I am most clearly of opinion that he is not. The only difference between an arrest on mesne process and in execution is this, on the former, the bailiff may permit the prisoner to go at large, provided he has him at the return of the writ: but in the latter case, if the bailiff voluntarily permit the prisoner to go at large, though only for a minute, he cannot afterwards retake him. The cases cited by the plaintiff's counsel are cases of escapes either in execution or after the return of the writ, and therefore not applicable. But the cases cited for the defendants clearly prove that the bailiff may give the prisoner, who is arrested on mesne process, indulgence, provided he has him at the return of the process. And this reason is strongly enforced by the statute with regard to letting a prisoner out on giving bail: for it does not only give the sheriff the power of letting him to bail, but it compels him to do so on giving sufficient bail. And if no security be given, it is done at the risk of the bailiff; and then if the prisoner do not voluntarily return, the bailiff may retake him before the return of the writ.

BULLER J.—As the declaration contains two counts, the plaintiff *prima facie* was at liberty to give evidence of two acts of imprisonment. The defendants first plead the general issue; and then, as to the first count they justify making the arrest under mesne process. To this the plaintiff new-assigns; and that new-assignment admits the legality of the arrest under the process, but charges that the defendant *Waite*, after that arrest, *by the consent of the plaintiff in the original action*, discharged the plaintiff out of custody, and afterwards imprisoned him again. This is a very material allegation, because it depends on the discharge being with the consent of the original plaintiff. Then how does this bear on the second count. The plaintiff has agreed by his new assignment that he did not intend to go for that arrest which was under the writ; therefore he has precluded himself from giving evidence of that on the trial. It is true that if there were in fact two imprisonments, and the plaintiff had not new assigned, as he has done here, he might have
given

given evidence of both at the trial: but there being only two imprisonments in fact, and one of them being abandoned on the record, the plaintiff could not have recourse to the second count; for he cannot avail himself of one and the same act of imprisonment both on the new assignment and on the second count. The plaintiff then relies on his new assignment: now the new assignment states that the retaking by *Waite* was after the plaintiff had been released by the consent of *Mattefon*; to this the defendant pleads that he was not guilty; and as the case states that *Mattefon* did not consent to his release, the new assignment is falsified. If the plaintiff could have proved two imprisonments besides that which he has waived on the record, he might have done it as the pleadings now stand: but there was but one imprisonment besides that which he has waived, and that one is the subject of the new assignment; therefore there is no evidence of any imprisonment on which he could recover on the second count. Thus it stands on the pleadings; and as to the general question of law, it is as laid down by my brother *Ashburst*; after an arrest on mesne process the bailliff may suffer the prisoner to go at large, provided he has him at the return of the writ.

1787.

ATKINSON
against
MATTEFON.

GROSE, J.—The reason of the difference between a retaking after an escape on mesne process and in execution is this, in the latter, if the prisoner escape by the voluntary permission of the gaoler, the plaintiff's debt is paid; and if the gaoler retake him he is liable to an action of false imprisonment. But in the former case the bailiff may suffer the prisoner to go at large, provided he has him at the return of the writ.

Postea to the defendant.

The KING *against* The Mayor, Aldermen, and Common Council of LONDON.

Monday,
Nov. 26th.

THIS was a rule calling on the defendants to shew cause why a *mandamus* should not issue, directed to them, commanding them to restore *P. Roberts* to the office of clerk or comptroller of the Bridge House estates. It appeared from the

A *mandamus* refused to restore to the office of clerk of the bridge house estates in London,

though the party was irregularly suspended, it appearing on his own shewing that there was good ground for the suspension, if the proceedings had been regular.

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affidavits

1787.
 The KING
 against
 The Mayor,
 &c. of LON-
 DON.

affidavits on which the rule was obtained, that the office is an ancient office for life, *quamdiu se bene gesserit*, in the disposal of the court of common council. The duty of it is to superintend and take care of certain estates which are appropriated by the corporation to the support and repair of *London Bridge*; some of the estates having been granted to them for that express purpose. *Roberts* was admitted and sworn into this office in 1749 on paying 4000 *l.* to the predecessor, and 600 *l.* for an alienation fine. In *January* 1785 the auditors of the city accounts reported that *Roberts* was a defaulter in his accounts for five years preceding, and that there appeared to be a *very large* balance in his hands; on which the corporation made an order that his accounts should be laid before a committee appointed for that purpose in two months, and that the balance should be paid to the chamberlain. On the same day the committee of the city lands reported that *Roberts* was a defaulter in his accounts as city remembrancer, and that there was a considerable balance in his hands in respect of that office. It likewise appeared upon his own shewing that repeated applications were made to him to deliver in his accounts, and frequent indulgences granted to him by the committee, till the 19th *May* 1786 when he delivered in a brief account without producing the proper vouchers, by which it appeared that he had a balance of about 2000 *l.* in his hands in respect of the first mentioned office. But he claimed to deduct 1500 *l.* out of that sum in respect of certain demands which he made as city remembrancer, which were not allowed upon this account. That after a peremptory order to produce the vouchers and pay the balance, which he acknowledged to be due, and to explain several parts of his accounts, he neglected to pay the balance, and wrote the following letter to the committee; "Having by your directions received a copy of the report to the court of common council, bearing date 13th *February* last, with the order made thereon, and having fully considered the same, *I must decline answering any question upon the subject.*" This refusal was communicated to the court of common council, who thereupon suspended *Roberts* generally from the *functions, exercise, and profits* of his office, without summoning him to attend, or giving him an opportunity of making any defence.

Adair, Serjt, *Mingay*, *Rose*, and *Gibbs*, shewed cause. First, This is not a corporate office for which a *mandamus* will lie.

It

It is a mere private appointment by the corporation; and the office may or may not exist as the corporation please. It is a grant to *Roberts* as long as he shall behave himself well; his misbehaviour therefore is a breach of the condition on which the office was granted, and the corporation may displace the grantee without any regular judgment of amotion. The office itself falls when the condition is broken; and it appears by *Roberts'* own affidavit that he has broken the condition. This is like an appointment of a steward *quamdiu se bene gesserit*, who may be removed for misbehaviour without any regular summons. And in 2 *Mod.* 316. a *mandamus* was denied because it did not sufficiently appear to the court that the office was such for which a *mandamus* would lie. Secondly, *Roberts* has only been *suspended*, not absolutely *amoved*, from his office: and it has never yet been determined that a *mandamus* will lie to restore an officer suspended. In the case of the *King v. The approved Men of Guildford* (a), the court refused to grant a *mandamus* to restore *Mills* one of the approved men who had been suspended, saying, that the party, if injured, might have an action upon the case: but that a *mandamus* did not lie, as *Mills* had not been totally removed, because the freehold still remained in him. *Twisden, J.* was indeed of a different opinion. It is true that in the following year a *mandamus* was granted on the application of the same person to restore him to the same office: but it does not appear from the reports (b) of the case but that the corporation had absolutely removed him in the intermediate time. That circumstance may fairly be presumed from the case, which states that *Mills* was *restored*: now according to the opinion which the court delivered the preceding year that, notwithstanding his suspension, the freehold still remained in him, he could not have been *restored* unless he had been previously *amoved*. Besides there was a defect in the return; for they did not state that they had any power of suspension; and on that ground perhaps the court granted the *mandamus*. And there is a strong reason why the court should not interfere in the case of suspension from an office similar to the present, because the employers of a person appointed to such an office of trust ought to have an absolute authority to compel him to the proper discharge of his duty, by restraining him from the exercise of his office, and by that means sequestering the profits of it for a time.

(a) 1 *Keb.* 868. 880.(b) 2 *Keb.* 1. *Sir T. Raym.* 152.

Thirdly,

1787.

The KING
against
The Mayor,
&c. of LONDON.

1787.

The KING
against
The Mayor,
&c. of LON-
DON.

Thirdly, but if a *mandamus* will lie, the court in their discretion will not grant it, as it appears by *Roberts'* own affidavit that he has been guilty of gross misbehaviour, sufficient even to warrant a removal from the office. He has not only acknowledged that he has a balance in his hands, the payment of which he evades making, but he has also peremptorily refused to explain his accounts to his employers. This alone is a good ground of amotion, supposing he had been regularly summoned to answer to the charge; if so, the court will not grant a *mandamus* to restore him, merely because there may be some informality in his suspension; for should he be restored in consequence of this writ, the corporation might instantly suspend or remove him for the same cause. In the *King v. Tidderley (a)*, the court said that although a return to a *mandamus* were insufficient, yet, if it appeared that the party ought not to be restored, they would not restore him. It is not incumbent on those who shew cause against a *mandamus* to prove that the proceedings have been strictly regular; for the party making the application is not entitled to the writ, if it appear by his own statement of the case that no injustice has been done to him: and as it appears that substantial justice has been done in this case, the court will not interpose by granting the *mandamus*; and *Roberts* is not without remedy, for he may bring an action on the case for money had and received. And though no regular notice was given to *Roberts* to make his defence, yet he had frequent opportunities of being heard; and it would have been absurd to have called on him formally to answer, after he had positively refused to do so by his letter.

Erskine, and *Tomlins*, in support of the rule. Whenever a person is improperly suspended or removed from an office, whether it concerns public or private duties, if he has a certain term in it, and there are profits annexed to it, and the party has no other specific legal remedy, the court will grant a *mandamus* to restore him. It has been granted in the instances of a minister of a dissenting meeting-house (*b*), a sexton, and a parish clerk (*c*), and those offices are not of a more public nature than the present, and the party making this application has no other remedy. This is a freehold office to which *Roberts* has been appointed for life, and from which he cannot be removed but by due course of law. It is likewise of a public nature, for

(a) 1 Sid. 14.

(b) 3 Burr. 1265. 7.

(c) 1 Str. 59.

part

part of the lands is appropriated to the public use. Even admitting that *Roberts* had been guilty of any misconduct, he should have been summoned to answer to the charge before he was suspended; but he has been condemned unheard, and without knowing that any regular complaint had been made against him. Nothing short of legal notice is sufficient to warrant the suspension from a corporate office. In the case of the *King v. The Mayor, &c. of Liverpool*, where a common council-man had been removed without legal notice, *Foster, J. (a)* said "a man ought not to be dispossessed of his freehold, without having a proper opportunity of making a defence to the charge upon which he is removed from it." But *Roberts* has not misbehaved towards the common council, who alone have the power of suspending or removing him. His letter, in which he declined answering any questions, was written to the committee only, and not to the common council; from whence it is to be collected that he wished rather to explain his accounts to the court of common council, when he should have an opportunity. The very circumstance of the balance of the account being disputed is decisive that a *mandamus* ought to go, in order to put the whole matter into a mode of being properly investigated. If the corporation had a sufficient ground for the suspension, they cannot object to the issuing of this writ, because they may return the matter specially; and if they have acted illegally, they should be compelled to put the matter on record, in order that *Roberts* may have an opportunity of bringing an action against them for a false return. In the *King v. Argent (b)*, the court granted a *mandamus*, because there was a mere informality in the removal, even though it clearly appeared that there was a sufficient ground for the motion, provided it had been regularly effected.

The Court at first doubted whether the office in question were of such a nature for which a *mandamus* would lie, under an idea that it had been refused in the scavenger's case. But upon further consideration, being apprized that a *mandamus* had been granted in the case of a scavenger (c), they were of opinion that it would lie in the present case. But on this matter's coming on again the next day,

ASHHURST, J. said, notwithstanding we were convinced of the impropriety of *Roberts's* conduct, which would have been a

1787.

The KING,
against
The Mayor,
&c. of LON-
DON.

(a) 2 Burr. 734.

(b) 1783.

(c) 1 Stra. 59.

1787.

The King
against
The Mayor,
&c. of Lon-
don.

reasonable and proper ground for suspending him from his office, we entertained some doubt whether we were not bound to grant a mandamus to restore him, as the proceedings of the court of common council were not strictly regular in suspending him. But on looking into the cases, we have found one exactly similar to the present; that is the case of the *King v. the Mayor, &c. of Uxbridge* (a), which warrants us to refuse this writ, though *Roberts* was irregularly suspended. We ought not in our discretion to grant it in this case; it appearing by the affidavits on which the application is made, that *Roberts's* conduct was extremely reprehensible. For after the court of common council as well as the committee had granted him the greatest indulgence, by allowing him further time to make up his accounts and to pay the balance, he wrote this extraordinary letter to the committee, that he would not answer any of their questions respecting his accounts. This behaviour was culpable in the highest degree; for *Roberts* was not to dictate to his employers. Nor is it any excuse to say that this refusal was made to the committee; they were authorised to examine his accounts by the common council; and shall *Roberts* dictate to his masters to whom they shall refer the matter? Therefore till he has made a proper submission and explained his accounts, we think we ought not to interfere. What operates very strongly with us is, that this is not a total dismissal, but only a *suspension* from the office, which may be rescinded by *Roberts's* making a proper submission. If indeed the committee will not accept his submission, and the court of common council will not restore him on his explaining his accounts in a satisfactory manner, and paying the balance, that may be a sufficient foundation for a future application. I do not agree with the counsel, who have argued in support of the rule, that *Roberts* has no other remedy; I am not satisfied that he has not two remedies: no case has been cited to shew that an assize will not lie for such an office as the present; or that he could not maintain an action for money had and received during his suspension.

Per Curiam.

Rule discharged (b).

(a) *Cowp.* 523.

(b) *The King v. the Mayor, &c. of London Hil. 6 Geo. 2. B. R.* Rule to shew cause why a mandamus should not be directed to the defendants, commanding them to

restore *Smith* to the office of clerk or surveyor of the city works. The affidavits in support of the rule stated, that this was an ancient and public office; that there were fees and profits belonging to it; that *Smith* had purchased

purchased the office for 600*l.* and had been appointed *quamdiu se bene gesserit*; that he was sworn into it by a particular oath appointed for that purpose; and he had also taken the oaths to government; and *Fazakerly* insisted that this was a stronger case than that of the treasurer of the new waterworks, to restore to which a mandamus had been granted. 1 *Lew.* 123. 1 *Sid.* 169.

Umlin, Serjt. and *Garret*, against the rule. This is not an office for which a mandamus will lie. The office of a surveyor is of a private nature, from which the party may be removed for misbehaviour. When an application was made for a mandamus to restore to this very office in 1658; the court refused to grant it, because it did not appear to be a public office. 2 *Sid.* 112. So a mandamus was refused to restore *White* to the office of clerk of the butcher's company in *London*. 3 *Salk.* 232. This is not like the case of the yeoman of the wood wharf, as that is an appointment under several acts

of parliament, and it is a public office. 2 *Str.* 832. A mandamus will not lie to restore a steward of a court baron, 3 *Lew.* 309. though it will of a court leet. *Comb.* 41. 347. 1 *Sid.* 169. For a private office restitution will not lie. *Sty.* 457. 1 *Ventr.* 143. And in the present case, a mandamus ought not to be granted, because the party may have an affize or an action on the case.

The Court were of opinion that, though from some of the circumstances it appeared to be like a private office, yet as the affidavits, which stated it to be a public one, were not denied, a mandamus ought to be granted, that they might be the better able to judge on the return. It likewise appears that the party, on his appointment to this office, takes a particular oath of office, and also the oaths to government. A mandamus has been granted to restore to offices of less consequence than the present, such as a sexton's.

Rule absolute.

* 1 *Ventr.* 143.

CATES *against* WEST.

GIBBS had moved on a former day for a rule to shew cause why the execution in this case should not be set aside, upon the ground that the *ca. sa.* was issued after the allowance of a writ of error, and notice of it to the plaintiff's attorney.

Mingay, *contra*, produced an affidavit, stating that the defendant's attorney had undertaken that the debt should be paid, if the plaintiff's attorney would give time; which the latter had agreed to do, provided *no delay* was intended by the other side. But after this agreement the defendant had brought a writ of error. This conduct being against good faith, he contended, that the court ought not to interpose.

Gibbs relied on the irregularity, as the allowance of the writ of error was a superseas. But,

The Court discharged the rule under these circumstances; considering the writ of error as sued out against good faith. But inasmuch as the writ of error was a superseas, and the plaintiff ought regularly to have moved to quash it, the

Rule was discharged without costs.

The

1787

The KING
against
The Mayor,
&c. of LON-
DON.

Tuesday,
Nov. 27th.

A rule for setting aside an execution, sued out after the allowance of a writ of error, discharged without costs, the writ of error having been taken out against good faith.

1787.

Tuesday,
Nov. 27th.The KING *against* RITSON.

The court of B. R. will not grant a *certiorari* to remove the record and proceedings out of a court leet, in order to enquire into the propriety of an amerciamment, where the fine has been estreated into the duchy chamber of Lancaster, and paid.

BEARCROFT, Plumer, and Broderick, shewed cause against a rule which had been obtained by *Marryat*, calling on the defendant, as chief bailiff of the liberty of the *Savoy*, to shew cause why a writ of *certiorari* should not issue to remove into this court the record and proceedings of the court leet held on the 3d of *May* 1787, for the said manor and liberty, at which court *Heaton*, one of the resiants, was amerced the sum of five pounds for non-attendance, in order that the same may be quashed for irregularity. The manor and liberty of the *Savoy* is parcel of the possession of the duchy of *Lancaster*. Previous to holding the *Easter* court, the steward issues his warrant to the chief bailiff, requiring him to summon all resiants, &c. to appear, and do suit and service; and also to warn a sufficient number of resiants to be *upon pain to serve offices*, &c.; whereupon the chief bailiff issues his precept to the deputy to summon them accordingly. It appeared that *Heaton* had been so summoned to attend the court at twelve o'clock on the 3d of *May*; that he came accordingly at the exact time, and waited a few minutes at the court-house; but the steward not being come at that time, he desired one of the officers present to take notice that he had duly attended, and that being elsewhere engaged, he was obliged to go away. It farther appeared, that though the summonses were issued to attend at twelve o'clock, yet, in order to give time to the suitors to collect together, it had not been usual to open the court till near one o'clock, and that this was well known to all of them. That the court was opened at the usual time on this occasion, and *Heaton* not appearing, the jury presented him, and amerced him for his default in the usual sum of five pounds; and that the amerciamment had been duly affeered. In *Trinity* term following the amerciament was estreated by the steward, and the estreat roll delivered by him upon oath into the court of the duchy chamber of *Lancaster*; in consequence of which the usual writ of *levari facias et capias* issued under the duchy seal to the bailiff of the liberty, into whose hands *Heaton* paid the fine.

It was urged against the rule, that in point of merits *Heaton* had no claim whatever to any indulgence. That it clearly appeared that his attendance according to the summons had been merely illusory; for he well knew what the usual time of the court's meeting was, and he ought in duty to have waited till that time. It might as well be said by a witness who was subpoena'd to attend a trial, that he had complied with his summons if he waited for a few minutes, and the cause did not come on immediately. A party applying for a *certiorari* must lay a fair ground for it. Originally it was merely a prerogative writ, and it never is granted of course. But in point of law it is a decisive objection to this application, that the fine has been estreated and paid. The records and proceedings of the leet are now become part of the records of the duchy chamber, and can no more be removed than the presentments and fines of any other inferior court, after they are estreated into the exchequer. The case of the sheriffs of *London* and *Middlesex* is directly in point, *Sir T. Jones* 169; where the court refused to grant a *certiorari* after a fine had been estreated into the exchequer, because that court had competent jurisdiction over the subject matter. There is no record left in the steward's court to transmit. Nor was *Heaton* left without remedy; for he might have applied to the duchy court in regular course to remit or mitigate the fine according to equity.

Marryat, in support of the rule, said he had moved it on two grounds; on the merits, and on form. Upon the first, because *Heaton* had in fact attended, and not being aware that his continuance there would be absolutely requisite, he had sufficiently shewn his respect to the court by desiring one of the officers to report his attendance to the steward, and his excuses for not waiting, that he had particular business. And upon a *certiorari* the party would be entitled to traverse the presentment itself, as had been decided in the case of the *King v. Roupell* (a), and in *Dyer* 13. pl. 64. there cited. On the second ground, It is sufficient to entitle the party to his *certiorari*, if the presentment appear to be informal on the face of it. *Cowp.* 460. 1 *Saund.* 135. Here there are two objections to the presentment; 1st, That this is a fine without affeerment; 2dly, That it was imposed by the jury instead of the court. 1st, Though in truth there has been an affeerment, yet, not being recorded, it must be taken

(a) *Cowp.* 458.

1787.

The KING
against
RITSON.

1787.

The KING
against
RITSON.

there was none: for whether there were any or not must appear by the record, and cannot be tried *per pais*. *Monnop v. Thomas* (a). 2dly, To shew that the amerciament ought to have been by the court, and not by the jury, he cited *Cro. Car.* 275. *Sir W. Jones*, 301. *Kitch.* 51. 2 *Stra.* 847. *Fitzg.* 109. 1 *Barnard.* 214. *S. C.* (b).

The Court, without hearing the other side on the objections to the presentment itself, were clearly of opinion that a *certiorari* would not lie in this case, as the fine had been estreated and paid.

Marryat desired till the next day to enquire whether, in point of fact, the fines had been estreated in the Duchy Court in those cases where *certioraris* had been granted; and afterwards he said that he could obtain no satisfaction on that head; but he begged leave to take a distinction between those cases where the fines were estreated into the Exchequer, and into the Duchy Court, in order to answer the case cited from *Sir Thomas Jones* 169; for the one was a court of record, and could summon a jury to enquire into the fact; the latter was not so, as is said by Mr. Justice *Blackstone* in his *Commentaries* (c); and the reason is given in *Jones* why this court will not interfere, because it would be to anticipate the judgment of the court of Exchequer, who have a competent jurisdiction over the subject matter. But

ASHHURST, J. said,—There could be no doubt but that the court of Duchy Chamber had cognizance of various matters which they might summon a jury to try. That informations for intrusions were frequently tried there.

Rule discharged.

(a) *Cro. Eliz.* 860.

(b) These and many other cases are collected in 2 *Bac. Abr.* 518-19. *Sed vid.* 5 *Mod.* 130. where it was held that if the party be not present in court, the amercia-

ment must be by the jury, and not by the court. *Et vid.* 2 *Rol. R.* 3. 8 *Co.* 38. 9. 40. *Hall v. Turbett*, *Cro. Eliz.* 241. *Mo.* 89. *Kitch.* 43. a.

(c) 3 *Blac. Com.* 78.

Lord MANSFIELD was not able to attend this Term.

In this Term, the judgments of B. R. in the cases of *Tindal v. Brown*, *ante*, 167. and *De Hahn v. Hartley*, *ante*, 343. were unanimously affirmed in the court of Exchequer Chamber.

MEMORANDUM.—In this Term *C. Runnington*, *S. Marshall*, and *J. Watson*, Esqrs. were called to the degree of Serjeants at Law, and gave rings with this motto, "*paribus se legibus*."

The End of MICHAELMAS TERM.

C A S E S 1788.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Hilary Term,

In the Twenty-Eighth Year of the Reign of GEORGE III.

SMITH *against* LASCELLES.

Wednesday,
Jan. 23d.

CASE for neglecting to make an insurance on the freight of goods shipped on board the *General Melville*, from *Dominica* to *London*. Plea, the general issue. A verdict having been given for the plaintiff at the Sittings at *Guildhall* after last Term,

Law now moved to set it aside, and stated that the following circumstances appeared at the trial. The plaintiff, being indebted to the defendant in 850*l.*, in *February* 1785 mortgaged to him his interest in the goods and freight by way of security; in which mortgage was contained a proviso that the deed should be void in case of payment in *August* 1785. In *July* 1785 the plaintiff, in a letter inclosing the bills of lading, desired the defendant to procure an insurance on the goods and freight, which

A merchant abroad, having effects in the hands of his correspondent here, may compel him to procure an insurance for him.

If a merchant here has been accustomed to procure insurances for his correspondent abroad in the usual course of trade, the

latter has a right to expect an insurance at the hands of the former, unless some previous notice be given to the contrary.—If a merchant abroad send bills of lading to his correspondent here, and at the same time give directions to procure an insurance, the latter cannot accept the bills of lading without obeying the orders to insure.

If a merchant abroad, interested in goods and the freight of a cargo, mortgage them to his creditor here for payment of money at a certain day, and by letter inclosing the bills of lading direct him to insure, the latter will be liable to an action for not insuring, notwithstanding the mortgage was become absolute before the letter was received.

1788.

SMITH
against
LASCELLES.

letter could not have been received before the mortgage became absolute. The defendant did cause insurance to be made on the goods, though not on the freight. At the trial proof was given of a letter having been received by the defendant from the plaintiff, but it did not appear whether it was the letter in question. Three grounds were now made for a new trial; 1st, That it had not been satisfactorily proved that any order to insure had been received. 2dly, That, supposing the letter to have been received, the plaintiff had no insurable interest; the defendant having insured the goods on his own account, and the mortgage at that time being forfeited. 3dly, But if the plaintiff had an insurable interest, the defendant was not bound to obey the plaintiff's directions to insure. So far from the defendant having money of the plaintiff's in his hands, the latter was actually indebted to him, and therefore he could not be compelled to give him a larger credit.

ASHHURST, J.—The plaintiff had only mortgaged his interest in the goods and freight to the defendant; and therefore, although the defendant may have insured the *legal* interest on his own account, he might also have insured the *equitable* interest remaining in the plaintiff on the plaintiff's account. It is true indeed that one person cannot compel another to make an insurance for him against his consent: but if the directions to insure be given to him, to whom the application would naturally be made in the usual course of trade, and he does not give notice of his dissent, he must be answerable for his neglect, because he deprives the other of any opportunity of applying elsewhere to procure the insurance.

BULLER, J.—This is not the first question of the kind that has come before me at *Guildhall*. In a case which arose near two years ago (a), I stated very fully to the jury the law respecting

(a) *Wallace v. Telfair*, Sittings at *Guildhall* after Tr. 1786, cor. Buller, J. In that case Buller, J. laid down the same principles; and also ruled that, where a merchant here had accepted an order for insurance, and limited the broker to too small a premium, in consequence of which no insurance could be procured, he was liable to make good the loss to his correspondent.

The following case was decided at the same Sittings at which *Smith v. Lascelles*

was tried, and relates to the same question;

Smith and Others v. Colgan and Another. This was an action on the case for neglecting to make an insurance on goods. The question was, whether the defendants had done their duty properly in the manner in which the insurance had been procured. Buller, J. The foundation of this action is negligence in the defendants; by which the plaintiffs have been injured. The defendants

ing the obligation under which a merchant residing in this country is to insure for his correspondent abroad, which I repeated in a great measure in this case. It is now settled as clear law, that there are three instances in which such an order to insure must be obeyed—First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them is such, that the one

1788.

SMITH
against
LASCELLES.

defendants were the correspondents of the plaintiffs. As to the orders for insurance having been received and accepted, there is no doubt. The only question is, whether the defendants have been guilty of negligence at any period of time, which will make them liable. The defendants received the orders in 1782, and they sent *Anderson*, their broker, to *Lloyd's* Coffee-house, to get the insurance effected; but he could not get it done from five to six guineas, which was the premium which he offered. This was not because the premium offered was too low for such a risk, but because the underwriters would not engage in the risk at all, on account of the ship's not being registered at *Lloyd's*. Now if the defendants, who lived in *London*, had gone no further, and done nothing else, it might have been a considerable doubt whether they would have been liable; for if a person to whom such orders are sent does what is usual to get the insurance made, that is sufficient, because he is no insurer, and is not obliged to get insurance at all events. But whether, by usage, it were incumbent on the defendants in this case to apply to the public offices is not material to be considered, because they went further, and the plaintiffs have adopted their acts. The next step they took (as it was now a forlorn hope) was to write to *G. K. and Co.* who were the ship-owners, living at *Newcastle*, thinking them the most likely persons to be able to get the insurance done; which they accordingly did on the 5th of *October* 1782. So far from being to blame in this, the defendants acted very meritoriously. When the loss was known,

they endeavoured to get the policy out of the hands of *G. K. and Co.* and they applied repeatedly, but could not succeed; no diligence was wanting on their parts; but the answer was, that *G. K. and Co.* had other sums to recover upon the same policy, and therefore could not let it out of their hands. Fresh application was made in 1782, to which *G. K. and Co.* sent an answer, which is indeed an evasive one; but the defendants had no means of obliging them to give it up, but by bringing an action; and it can hardly be said that not doing so is negligence in them. If the defendants had made a blunder in the insurance which would have avoided the policy, that would have been negligence; but the policy is a good one; and it was only owing to the knavery and failure of *G. K. and Co.* that the plaintiffs have lost the benefit of it, for the underwriters have actually paid the loss to *G. K. and Co.* In the midst of these transactions one of the plaintiffs came home; all the business was laid before him by the defendants; he approved of their conduct; he took up the affair, and considered *Anderson* as his agent. Now if with a knowledge of all the circumstances he adopted the defendants' acts for a moment, he ought to be bound by them. If he had intended to insist on his right to recover the money from the defendants, he should never have looked to others at all. But afterwards, when *G. K. and Co.* were likely to fail, then he considers the defendants as his debtors.

Verdict for the defendants.

has

1788.

SMITH
against
LASCELLES.

has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. 3dly, If the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction. It is true, as has been observed, that unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure. But if the commission from the merchant abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent here cannot accept it in part, and reject it as to the rest. If such be the law on this subject, the fact in this case is clear; for, with regard to the letter, there is no pretence for saying that any other was received by the defendant from the plaintiff, but that containing the order of insurance; and the jury have so found it.

GROSE, J.—of the same opinion.

Rule refused.

Thursday,
Jan, 24th.

The KING against R. BROOKE and others.

A commitment by a justice of peace for a time certain, as for 14 days, under the vagrant act, is a commitment in execution, and the party is not entitled to be bailed.

And if another magistrate on illegal and corrupt motives discharge a

person so committed, the court will grant an information against him. The court, on granting an information, will not require the prosecutor to give security for the costs in case the defendant should be acquitted, beyond the extent of the recognizance in 20^l. required by 4 & 5 W. & M. c. 18. s. 2.

A RULE had been obtained last term calling on the defendants *R. Brooke*, *J. Robinson*, and *D. Williams*, justices of the peace for the liberty of the Tower of London, to shew cause why informations should not be filed against them for certain misdemeanors in discharging *C. Bannister*, *W. Palmer*, *C. Delpini*, and *R. Gaudry*, out of custody, who had been committed by *J. Staples*, a justice of the peace, as rogues and vagabonds under the vagrant act 17 Geo. 2. c. 5. The second section of that statute enacts, "That all common players of interludes, and all persons who shall for hire, gain, or reward, act, represent, or perform, or cause to be acted, represented, or performed, any interlude, tragedy, comedy, opera, play,

" farce,

1788.

The KING
against
BROOKE
and Others.

“ farce, or other entertainment of the stage, or any part or parts
 “ therein, not being authorized by law, shall be deemed rogues
 “ and vagabonds within the true intent and meaning of the
 “ act.” The sixth section requires any justice of the peace, on
 receiving information that rogues and vagabonds are within his
 jurisdiction, to issue his warrant to apprehend them, and cause
 them to be taken before any justice of the peace of the same county,
 liberty, &c. By the seventh section, any justice, before whom any
 rogue and vagabond is brought, is required “ to inform himself, by
 “ examination upon oath of the person apprehended, or of any
 “ other, of the condition and circumstances of the person so ap-
 “ prehended, &c. the substance of which examination shall be
 “ put in writing, and be subscribed by the person so examined;
 “ and the said justice shall likewise sign the same, and transmit it
 “ to the next general or quarter-sessions of the peace to be hold-
 “ en for the same county, &c. there to be filed and kept on re-
 “ cord. And such justice is hereby required to order all such
 “ persons so apprehended to be publicly whipped, or to be sent
 “ to the house of correction, there to remain until the next
 “ general or quarter-sessions, or for any less time, as such
 “ justice shall think proper, &c.” By the 26th section, it is
 enacted “ that any person aggrieved by any act of any justice
 “ of the peace out of sessions, in or concerning the execu-
 “ tion of this act, may appeal to the next general or quarter-
 “ sessions of the county, &c. giving reasonable notice thereof,
 “ whose order thereupon shall be final.” The affidavits filed in
 support of the prosecution stated that *Staples*, who was a jus-
 tice of peace residing within the liberty of the *Tower*, had is-
 sued his warrant on the 17th *July*, returnable before himself,
 for apprehending *Bannister* as a rogue and vagabond, under the
 2d section of the act before recited; and upon due examination
 had committed him to the house of correction for 14 days.
 That the defendants *Brooke* and *Robinson* had, on the same day,
 issued their warrant for discharging him out of custody, upon
 his giving bail to appear at the next quarter-sessions, and to pro-
 secute his appeal against the conviction. The affidavits also
 stated that *Staples* had granted a similar warrant to apprehend
William Palmer on a similar information laid before him. That,
 upon the officer’s arresting him, he produced a supersedeas out
 of his pocket, which the officer would not allow as sufficient
 to discharge the warrant, but insisted upon taking him before

1788.
 The KING
 against
 BROOKE
 and Others.

Staples by whom it had been issued. That was opposed by *John Robinson*, a brother of one of the defendants, who took the prisoner, against the consent of the officer, to the court-house, whither the defendants *Brooke* and *Robinson* had given orders to the several officers to bring all persons who should be apprehended by any warrant of *Staples*, and where they were then sitting; who, upon the officer's refusing to set *Palmer* at liberty unless the warrant was discharged, without hearing the information on which the warrant had been granted, or examining any evidence, wrote "discharged" upon the warrant. On the 19th *July Palmer* was again apprehended on another warrant of *Staples*, who regularly convicted him as a rogue and vagabond, and committed him to the house of correction for 14 days. And he also wrote underneath the commitment, "Take notice that *William Palmer* cannot be discharged before the expiration of the above term, unless such discharge be signed by two justices, one of whom must be the committing magistrate." The prisoner was however discharged about an hour after his commitment by the defendants *Brooke* and *Williams*, on his appealing and giving bail to prosecute it. There were other warrants issued by *Staples* against other persons, and discharged by the defendants under similar circumstances.

The defendants, in answer to these charges, stated in their affidavits that they had acted as justices of peace for some years past, and that their usual place of doing business was at the court-house, where there was a regular attendance for that purpose. That *John Palmer* had obtained a licence at the quarter-sessions under the 25 *Geo. 2.* for musical entertainments, and had retained, as performers, the persons who had been convicted by *Staples*: That they having appealed against the convictions, and *Staples* having refused to bail them, they the defendants, at the instance of the persons committed, and by advice of Mr. *Rutson*, the clerk of the peace, had taken sufficient bail for their appearance at the next quarter-sessions to prosecute their appeal, conceiving that, the act having given the party committed a power of appeal, the sentence should be suspended in the meantime. That afterwards at the sessions the appeals were allowed, and the convictions unanimously quashed. That as to the super-sedeas granted by them it was agreeable to the common practice. And they denied generally any interested motives in what they had done.

It

It appeared, in answer to a question put by the court in the course of the argument, that the convictions had not been quashed on the merits.

Piggott, Morgan, Sylvester, and Taylor, shewed cause, and contended that the information ought not to go unless it appeared that the defendants had acted both corruptly and illegally. But it was first necessary to make out that they had acted illegally. As to which, although no express power is given by the statute to bail the party under the 7th section, yet, as he is permitted to appeal to the next sessions, it follows of course that he may be bailed in the mean time, otherwise the appeal is nugatory; for the party may suffer the punishment before his appeal can be heard. Now the defendants did not altogether discharge the prisoners committed, they only changed their custody; for when they were bailed, they were still in the custody of the law. If the defendants had taken insufficient bail, with a view to favor the escape of those persons from justice, that might have been a ground for an information: but it appears that they did take responsible bail; and that the prisoners actually did appear to prosecute their appeal at the sessions, whose final adjudication against the propriety of the convictions fully justifies the conduct of the defendants, since it must now be taken that the convictions were groundless; and unless the persons committed had been admitted to bail, they would have suffered unjustly and illegally. But even if the court should be of opinion that the construction of this act of parliament by the defendants was wrong, and that, strictly speaking, their conduct in this particular was not legal, yet inasmuch as it was a doubtful question upon this act whether the commitment by a magistrate of a rogue and vagabond was a commitment in execution, or only for safe custody, which had never received any judicial determination in a court of law, the court ought not to interpose in this extraordinary manner by granting an information against these magistrates; especially too as they deny having acted from any interested motive. With respect to the other part of the charge for granting a supersedeas to the warrant, although perhaps it may not be strictly justifiable, yet it has obtained very much in practice of late, and has been found highly beneficial in many instances. And if the defendants were warranted in bailing the persons committed on their undertaking to prosecute their appeals at the sessions, they were

1788.

The KING
against
BROOKE
and Others.

1788.

The KING
against
BROOKE
and Others.

were equally justified in granting the supersedeas to the other warrant for the same reason, because the parties had appealed, there being no other charge against them.

Bearcroft in support of the rule. There can be no doubt but that the defendants have acted illegally. The law is clear that where a man is committed in execution, he is not bailable. Now the commitment by *Staples* under this act was clearly in execution. And with respect to an appeal being given by the statute, the judgment of the justice convicting is not less binding on that account; it is like a writ of error brought to reverse a judgment in a court of law. And though an appeal is given in this case, the ordinary course of punishment adjudged by the conviction is to take place in the same manner, as in case of a judgment in a court of law upon a criminal proceeding, where the punishment may be inflicted before the writ of error can be determined. The defendants also acted illegally in granting the supersedeas to the warrant; for though it may be allowable to grant a supersedeas in certain cases, yet that is where the offence is clearly bailable. The supersedeas granted in this case was highly criminal, by which the defendants *Brooke* and *Robinson* took upon themselves, without even hearing the information or examining any witnesses, to discharge a warrant which had issued for apprehending *Palmer*, and thereby stifled justice in the outset. There can be no pretence for insisting that the defendants did not know this to be illegal; and indeed it was so notoriously wrong, that their conduct can only be ascribed to improper motives. This circumstance alone is sufficient to shew the real motives which actuated the conduct of these defendants throughout the whole business; from whence it appears that they intended to protect all those persons who were acting in defiance of law.

Erskine, Fielding, Conſt, and *Garrow*, on the same side were stopped by the court.

ASHHURST, J.—If this matter had rested merely on the charge of the defendants having admitted the parties to bail after they had appealed against the convictions, I should have been very unwilling to have granted an information against them on that ground; because as the act of parliament gives a summary jurisdiction to a magistrate to convict persons coming within the description of vagrants, and in the same breath gives the party convicted a right of appeal from such conviction,

conviction; a magistrate not very conversant in the law might naturally enough have conceived that the meaning of the legislature was that the party should not undergo the punishment till the appeal was determined; and therefore if the justices had acted *bonâ fide*, I should not have been inclined on this ground alone to have granted the information. But the principal ground is that they have taken upon themselves to supersede a warrant of a justice of peace, having competent jurisdiction, before the matter had been inquired into at all, and without having any evidence before them. This was taking upon them to prejudge that the justice granting the warrant must have done wrong, and that the party on appeal would be acquitted; this was certainly a palpable and gross abuse of their office. But there are other circumstances besides to shew that this could not have been done in the ordinary course of justice, but that the defendants have made themselves parties in the business, and have associated themselves with the persons who had been convicted by the magistrate; for two of the defendants *Robinson* and *Brooke* ordered the constable to execute his warrant at the court house, and would not suffer him to carry his prisoner to the magistrate before whom the information had been laid, and they took upon themselves to discharge the prisoner, without even hearing what had been alleged against him. Now admitting that a practice may have obtained of granting a supersedeas in bailable offences, the legality of which is very doubtful, yet at any rate it cannot hold in a case of this sort where the party is convicted in the first instance as a rogue and vagabond, and committed in execution; for there he is clearly not bailable; this therefore was gross misbehaviour in the defendants which cannot be imputed to mistake or ignorance of the law. And though they have denied generally that they acted from any interested motive in this business, yet that is not sufficient; for if they acted even from passion or from opposition that is equally corrupt as if they acted from pecuniary considerations.

BULLER, J.—after commenting upon the circumstances disclosed by the affidavits, and discriminating between the degrees of guilt of the different defendants, was clearly of opinion that the charge of corruption was brought home to the two defendants *Brooke* and *Robinson*, against whom an information ought to go; but that as *Williams* had not interfered in the commencement of the business, and had only adopted the opinion of the other two

1788.

The King
against
BROOKE
and Others.

defendants upon the construction of the act, the rule should be discharged as against him; especially as the ends of public justice would be equally answered by granting the information against the other two. He then observed, as to the construction of the vagrant act, that he had no doubt upon the subject, that the commitments of the justice in this case were in execution, consequently the parties could not be bailed, notwithstanding that the statute had given a right of appeal against the conviction to the next sessions. It is said that it is strange that the party should suffer the punishment while the appeal is pending; but we are to consider it like the case put at the bar of a writ of error which does not suspend the execution of a judgment which it is brought to reverse. It would be absurd to put a contrary construction upon this act of parliament, for if the appeal were to put an end to the imprisonment by entitling the party to be bailed, the consequence would be that, although the conviction were affirmed, the party would escape from punishment and laugh at justice; for the imprisonment is to run from the time of the conviction; and, here the parties having been sentenced to be imprisoned for fourteen days, the time would be expired before the appeal was determined. The defendants have also acted wrong in another particular; for by the 26th section it is enacted "that persons aggrieved may appeal to the next sessions giving reasonable notice thereof;" but it does not appear in this case that any notice was given either to the prosecutor or to the committing magistrate, when the defendants admitted the several parties to bail; and they could not have mistaken as to whom notice ought to have been given.

GROSE, J.—It must be shewn in these cases that the magistrates, against whom informations are prayed, have acted illegally and corruptly. As to the illegality of the proceedings of these defendants there can be no doubt. In the course of the last term (a) a difficulty arose in my mind from the obscure

(a) The question relative to the construction of the vagrant act upon this point arose in a case of the King against Sparrow and Urquhart last term, where the court at first entertained some doubt. A certiorari had been granted in that case to remove the proceedings before the justices into this court, and a rule was afterwards obtained to shew cause why it should not be quashed. One Aldred had been committed by them, as a vagrant, to the next sessions, against which commitment he had appealed; and that

appeal was then pending. The Court were all of opinion that no certiorari could issue then, and therefore that it must be quashed; for the magistrate had committed to the sessions, and the vagrant had appealed: so that both parties had agreed that there should be an appeal to the sessions, and therefore the certiorari ought not to issue till the sessions had determined the case. Erskine then moved that Aldred might be bailed, which was refused.*

* Vide post. 198.

penning

penning of this act of parliament. I doubted at first whether a party committed by a magistrate upon the 7th section was committed in execution; but I have had time to consider of it since, and I am now clearly of opinion that it is a commitment in execution: but whether so or not, I am clearly of opinion that the party is not bailable, and so it seemed to me last term. But as this question might have been a matter of doubt and difficulty to the defendants, if they had acted merely from an error in judgment, they ought not to be answerable in so criminal a proceeding as an information. But there are other acts of illegality imputed to them besides that; one of which is that they took upon themselves to bail the several persons who had been committed without the knowledge or concurrence of the committing magistrate, which they are expressly forbidden to do by the 32d section. And as they justify themselves upon their construction of the act, they cannot be supposed to be ignorant of this clause. After condemning the granting of the supersedeas, he went into a detail of the facts as they appeared upon the affidavits, from whence he inferred that corrupt motives were clearly to be imputed to the defendants *Brooke* and *Robinson*, and agreed that as to *Williams* the rule should be discharged.

Rule absolute against the defendants
Brooke and *Robinson*.

Piggott then moved the court to compel the prosecutors to give security for the costs in case the defendants should be acquitted, over and above the recognizance in 20*l.* required by the 4 & 5 *W. & M. c. 18. s. 2.* according to what the court had thrown out in the case of the King against *Filewood* and another, *ante* 145. but

The Court refused the application; saying, that if any alteration were necessary, it had better be done by legislative authority, than by an order of the court.

The KING against RENNETT.

Thursday,
Jan. 24th.

RULE to shew cause why a mandamus should not issue directed to the defendant, as steward of the court of *A.*, commanding him to admit a person, who claimed as heir at law, to a customary estate within the manor.

Mandamus to admit a copyholder, claiming by descent, refused.

In post. 1485.

It an instance of one granted in favour of a purchaser.

1788.

The KING
against
BROOKE
and Others.

1788.

The KING
against
RENNETT.

It was contended, against the rule, that this court would not interfere, as the party applying had another remedy in the court of chancery. *Lit. f.* 66. 67. *Cro. Jac.* 368. *1 Ro. Abr.* 108. And at all events a mandamus should not be granted to admit a person who claims by descent; because he may enter and do every other act before admittance.

Bearcroft in support of the rule. *Agar* against it.

The Court had no doubt but that a mandamus ought to be granted to compel a lord of a manor to admit a copyholder, if a proper case were laid before them (a); but as the party, making this application, claimed by descent, it could answer no purpose to grant the mandamus, since he had as complete a title without admittance, as with it, against all the world, but the lord.

Rule discharged.

(a) Vide *R. v. The Borough of Midhurst*. *1 Wils.* 283.Friday,
Jan. 25th.

A party applying for an information must waive his right of action; but if the court, on hearing the whole matter, are of opinion that it is a proper subject for an action, they may give the party leave to bring it.

The KING against SPARROW and URQUHART.

A RULE having been obtained in the last Term, calling on the defendants to shew cause why an information should not be granted against them for misbehaviour in their offices as justices of the peace;

Mingay, who was now to have shewn cause on behalf of the defendants, called on the prosecutor's counsel to make his election, before the matter was gone into, whether he would prosecute this application, or resort to his action; which was refused by *Erskine*, the prosecutor's counsel, who insisted on taking the opinion of the court on granting the information before he would relinquish his right of action.

BULLER, J.—was of opinion that it was incumbent on the prosecutor to decide in the first instance; and said he recollected a case in which this point had been determined.

The Court took time to consider of this matter; and on the next day

ASHHURST, J. said—They had considered the point very fully, and thought it proper to establish it as a general rule for the future, that when a person applies for an information, he is understood to waive his right to bring an action, unless the court should, on hearing the whole matter, be of opinion that it is a proper

But on what authority is this asserted? he also contra L. Nottingham v. Roper in 2 B. & A. in case of *Menckow v. Lamb*. D. X Yet there is an apparent reason for forcing an admittance: because without admittance the heir cannot surrender to the use of his will, & without such surrender he cannot make a legal devise of the copyhold.

proper subject to be tried in a civil action, and should specifically give him leave to do so. It frequently happens that informations are moved for merely to sift out the opinion of the court, even when the party thinks there is little probability of succeeding: it is unreasonable to engage the time and attention of the court in such a manner, and such applications are unnecessary if the party resort to his private remedy; and if an information be granted, it is of course to stay the proceedings in an action for the same cause.

In this case the rule for an information was abandoned on the prosecutor's electing to bring his action.

The KING *against* WATSON and Others.

1788.

The KING
against
SPARROW.

Friday,
Jan. 25th.

ON a rule to shew cause why an information should not be granted against the defendants, the following facts appeared; *Reynolds*, one of the defendants, who was in partnership with the defendant *Watson*, was in the year 1785 mayor of *Yarmouth*, and as such president of the court of admiralty there, of which *Watson* was registrar. *Hurry*, the prosecutor of the present information, summoned *Watson* to the court of requests in *Yarmouth* to recover back 11*s.* which he conceived *Watson* had over-charged him in an account relative to the salvage of some goods belonging to a captain, for whom *Hurry* was agent; at which court *he swore that Watson was indebted to him in that sum, and afterwards explained that it was as agent for the captain.* After swearing this, *Hurry* was informed by *Reynolds* that the court had no jurisdiction over the subject matter: notwithstanding which *Hurry* was afterwards indicted by *Watson* for the perjury, in swearing that *he was indebted to him*, and at the trial was acquitted on the merits. Immediately after this acquittal *Watson* inserted a paragraph in the provincial papers in that part of the country, asserting that *Hurry* had been acquitted merely on account of a flaw in the indictment, and that another indictment would be preferred against him. *Hurry* then brought an action against *Watson* for a malicious prosecution, in which he recovered 3000*l.* damages; and on a motion in the Common Pleas to set aside the verdict for excessive damages, accompanied with an affidavit that the payment of that sum would be

This court will not grant a criminal information against the members of a corporation for a misapplication of the corporation money.

An order made by a corporation, and entered in their books, stating that *A. B.* (against whom a jury had found a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in *C. B.*) was actuated by motives of public justice, &c. in preferring the indictment, is such a libel reflecting on

the administration of justice, for which the court will grant an information against the members making that order.

1788.

The KING
against
WATSON
and Others.

attended with the ruin of *Watson*, the court recommended a compromise, and on *Hurry's* agreeing to accept 1500*l.* they discharged the rule. Under these circumstances, at a meeting of the corporation of *Yarmouth* in *September*, the defendants (twenty in number), being a majority of the corporation then present, voted and entered the following order in their books; "That divers suits and prosecutions had followed the said Mr. *Watson's* having been summoned by Mr. *Hurry* to the court of requests, which had occasioned a large expence to Mr. *Watson*; that the assembly were sensible that Mr. *Watson* was actuated by motives of public justice, of preserving the rights of the corporation to their admiralty jurisdiction, and of supporting the honor and credit of the chief magistrate; and therefore they vote him the sum of 2300*l.*" The prosecutor had applied for a copy of the entry in the corporation book, which was denied him; but he was permitted to read it.

Erskine obtained this rule in the last Term on three grounds. First, that the payment of the 2300*l.* by the defendants, as members of the corporation, to *Watson*, was a gross abuse of their trust. 2dly, That it was a high contempt of the administration of public justice in the terms of the order. 3dly, That the manner in which this proceeding was carried on was a libel on *Hurry*.

The Court now desired the counsel not to go on the first point, which might be the subject of an application to the court of Chancery, but could not be the ground of a criminal information in this court.

Bearcroft, *Partridge*, and *Graham*, against the rule. The order in question cannot be considered as being intended by the defendants to reflect on the administration of public justice; for the sum which had been voted to *Watson* was voted to him from a principle of compassion. At the most these defendants have only been guilty of an error in judgment. And the defendants have positively sworn that they had not the least intention of libelling *Hurry*. But if the court should give leave to file an information, it will be impossible that the prosecutor can succeed at the trial. For in the first place they have no means of procuring the original order, on which to frame an information, the tenor of which must be stated, because the corporation are not bound to criminate themselves by the production of it.

BULLER,

BULLER, J.—It has been solemnly determined that in a criminal prosecution you may give notice to the defendant to produce a paper in his possession; and, in case he neglects to produce it, you may give other evidence of it (a).

1788.

The KING
against
WATSON
and Others.

In

(a) *The Attorney General v. Le Merchant.* This cause first came on to be tried before Eyre, Baron, in the Exchequer, on the 4th of December 1772. It was an information grounded on the statute 7 Geo. 1. c. 21. s. 9. for importing tea into *Guernsey* without having first been laden and shipped in *Great Britain*, which subjected the goods and the vessel to a forfeiture. In the course of the trial the Attorney General offered to read some letters concerning this tea which had been sent by the defendant to *Channon*, a witness for the Crown, which letters were proved to have come to the defendant's hands under an order made by the Lord Chancellor for the delivery up to him of all papers and letters seized under a commission of bankrupt against *Channon*, among which were these letters. The solicitor of the excise had contrived to take copies of them whilst they were in the hands of the clerk of the commission; and notice having been given to the defendant to produce the original letters, and that being refused, the Attorney General offered to read these copies. This was objected to by the counsel for the defendant, upon the ground, principally, that a defendant in a criminal case was never bound to produce evidence against himself; that he was guilty of no crime in not producing them; and that the Attorney General had no right to call upon him to produce them, or ask a single question concerning them; consequently no copies could be admitted in evidence. But Eyre, Baron, admitted the evidence, though he said he had some doubt about it. He conceived that the principle on which copies were admitted as evidence was this, that they were the best evidence which the nature of the case would admit of, or that was in the power of the party producing them to give; and not on the idea of any crime in the person, in whose possession the originals were, refusing to produce them. And he thought there was no difference between civil and criminal cases.

Other objections observed upon in giving judgment were taken on behalf of the defendant, which were over-ruled.

Afterwards, on a motion for a new trial, the Lord Chief Baron said; This cause came before the court on a motion for a new trial. My brother Eyre reported the case as stated in the information as upon an act of parliament made in the 7 Geo. 1. c. 21. to prevent importing tea into *Guernsey*. He stated that an objection was taken upon the cross examination to the evidence of the people who gave an account of the transaction; therefore the plaintiff, in order to support their credit, produced some letters under the hand of the defendant, of which they had taken copies, the originals being in the hands of the defendant, and therefore there was a notice proved to his agent, his attorney, and likewise to himself; and upon that my brother Eyre was of opinion, according to the general rule, that where papers are in the hands of the adversary, copies might be given in evidence. These copies made the case so strong for the Attorney General, the plaintiff, that if they are regular and proper evidence, the case was fully proved. On the other hand, if the copies of these letters were not proper evidence, the jury might have found otherwise. The question now is, whether that evidence was properly admitted or not? If it were improperly admitted, there ought to be a new trial. If properly admitted, there ought not. Then another objection was that this act could not have effect in *Guernsey*, as the usage was to have all the acts of parliament at *Guernsey* registered, which this act was not. My brother refused to let in that evidence to prove the usage; because if it is the law of the land, there is no occasion to state it: on the other hand, if it is not the law of the land, but is contrary to it, it will have no effect. Now the question comes to be therefore, whether these copies of letters were properly admitted as evidence or not; and that depends upon the exceptions which were

1788.

The KING
against
WATSON
and Others.

In answer to which it was said that the court will not assist the party to get materials in a criminal prosecution. And even if

were taken to it by the gentlemen at the bar in the motion for a new trial. First it was objected, that copies of letters or papers in the hands of the adversary ought not to be read in criminal cases; that was one general objection. And the other, that supposing, for argument sake, they ought to be admitted, yet in this particular instance the notice which was given was not sufficient. As to the first objection, that copies are not admissible in any criminal case, because that would be to oblige a man to produce evidence against himself; in answer to it, I do not recollect that they have produced any one case to shew any difference at all as to the rule of evidence in criminal, and in civil, cases; therefore the rule of evidence in both cases is the same, that is, to have the best evidence that is in the power of the party to produce, which means that, if the original can possibly be had, it shall be required, but if that original be destroyed, or if it is in the hands of the opposite party who will not produce it, then in a case of a deed, a counter one, or sometimes a copy of the deed, or copy of the paper, is evidence to be admitted. But it is said that this does not hold in criminal cases, because the consequence of it would be to compel a man to produce evidence against himself; and it is a rule of law, that a man in a criminal case is not compellable to produce evidence against himself; for this purpose the case of the *King* and *Parnell* in the King's Bench, and the case in *Sir John Strange* 1210 were relied upon. Now, with respect to this, I take it that the rule is certainly true, and the cases that were cited to this purpose are unquestionably right, and law; but they do not apply to the present case. The *King* and *Parnell* was in *Hil. 22. Geo. 2. 1748*. I heard the motion. There had been an information against Doctor *Parnell*, the defendant, who was vice chancellor of *Oxford*, for refusing to act upon a complaint against some scholars, and the motion was the common motion for a rule to shew cause why the attorney general, and those authorized by him, should not inspect all the public books, archives, records, &c. in the custody of the proper officer, to take copies. The attorney general, *Sir Dudley*

Ryder narrowed his demand and desired only to see the statutes of the university, but the court refused it, because it would be to compel the defendant to produce evidence against himself; for if the court had granted this rule for the inspection, and the Doctor had disobeyed it, he would then have been liable to an attachment. So in the case in *Strange* 1210. Upon that rule, if they had obeyed it, they would have been compelled to produce evidence against themselves, and have been subject to an attachment if they had not. But the defendant, *Le Merchant*, is not compellable to produce these letters against himself; for he is liable to no punishment at all if he does not, but is left at his entire liberty either to do it or not; the only consequence must be that these copies (which must be sworn to be true copies) are read against him. If they are not true copies, he has it in his power to prove that by producing the originals. It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common cases is, because the party who has them in his custody, and does not produce them, is in some fault for not producing them; it is considered as a misbehaviour in him in not producing them, and therefore in criminal cases a man who does not produce them is in no fault at all; and for that reason a copy is not admitted. But I do not take that to be the rule; it is not founded upon any misbehaviour of the party, or considering him in fault; but the rule is this; the copies are admitted when the originals are in the adversary's hands for the same reason as when the originals are lost by accident; the reason is, because the party has not the originals to produce. Two of my brothers, who have been in an office that has given them an opportunity of a greater degree of experience in criminal law than most of the judges, do not recollect any difference being made between civil and criminal cases. One of my brothers has mentioned a case exceedingly apposite to the present, which is *Laver's* trial (a); there the charge against him was an overt act in publishing a treasonable paper in the county of *Essex*: a witness proved he did produce a paper doubled, and

(a) 6 St. Tr. 229.

if the prosecutor were in possession of the original order, it would be hardly possible to make the information criminal on the face

1788.

of The KING
against
WATSON
and Others.

and shewed him only part of the paper doubled, and then put it in his pocket; he remembered some lines of it, this was parol evidence of the contents of the paper; the purport of which was to excite the nation to an insurrection, and to shake off the miseries and calamities they were under from the present ministry. In that case no objection was made by the counsel Mr. Hungerford and Mr. Kittleby; no difficulty was made in this evidence; they seemed to say that the whole ought to be produced; that it was only part; and therefore took off the force of the evidence; they did not object to that man's giving parol evidence of the contents of a paper in the hands of a prisoner; and that in a case of high treason. And there Mr. Philip Yorke, solicitor general, said "after this paper was produced the prisoner took it back, put it into his pocket, and kept it; therefore the paper itself being in his custody we were properly admitted to prove the contents of it by parol evidence." This is not contradicted by the court, and though it is only the saying of one counsel, yet not being contradicted at all it is very strong. Another objection has been made that this notice is not sufficient: the answer is, I know no difference between the rule of evidence in civil and criminal cases. Then, if there be no such difference, the rule which has always been followed and allowed in civil cases is that notice be given to the attorney or agent of the adverse party: now in this case without going minutely into the consideration, whether the notice was proved to the defendant himself, and was good, here is unquestionably notice proved to Sayer who is the agent and solicitor of *Le Merchant*, into whose hands it appears that these letters had actually been delivered; and then there is a notice likewise to *Davy*, who is the attorney for the defendant in this very cause, and no attempt was made on the part of the defendant to prove what was become of these letters, or that it was not in his power to produce them. The last objection is this, that they were not permitted to give evidence of the not registering the act of parliament, and in short to take off the force of the act, because it was not registered. Now this is an objection

which goes to the power of the legislature of this kingdom; an objection which will never be permitted to be made in a court of justice, because it is without the least color or foundation. No man who knows any thing of the constitution of this country can deny the power of the legislature to bind all the subjects of it in every part of the world; the only difference is that some of these parts are not bound by act of parliament unless specially named; but if they are, they are bound as much as any part of *Great Britain*; and if we were to allow objections of this kind, it would be followed by one of these absurdities. In the first place, if it is in the power of the people of *Guernsey* to register or not as they think proper, the consequence would be, that they would have a power of controlling the legislature: on the other hand, if the king will not order these acts to be registered, he would have a power of dispensing with the law; which law is of the whole legislature; it is therefore attended with one or other of these consequences, both of which are absurd; consequently there is no color or foundation for that part of the objection. I think I have considered, as well as I could, all that was mentioned by the counsel, and given such answers as occur to me; therefore I am of opinion that the directions of my brother *Eyre* were perfectly right, and consequently there ought not to be a new trial.

Rule discharged.

The King against *Archer*, Mich. 28 Geo. 3.

The defendant who resided at *Plymouth* had been indicted by Dr. *Rennett* of that place for an assault, and had suffered judgment to go by default. He was this day brought up to receive judgment. Affidavits were offered to be read by the prosecutor, of expressions made use of by the defendant, confirming and aggravating his guilt, which had been uttered by him in the hearing of two persons, and by them afterwards related to the persons making the affidavits. The prosecutor laid a ground for entitling himself to read these affidavits by swearing to an application to both those persons to come forward with their testimony, which they had refused, and strongly insinuating that they were under the influence of the defendant. The reading of these

1788.

The KING
against
WATSON
and Others.

of it by the assistance of any innuendos which a jury would find. Besides there was no publication of this supposed libel in point of law; for this is an entry in the corporation book, to which no other persons but the members of the corporation are permitted to have access. And though in some cases the court will order an inspection of corporation books, yet that is only done for the purpose of ascertaining any custom or other civil right, and not where it is merely for the purpose of instituting a criminal proceeding against the members of the corporation. The defendants do not dispute the propriety of the verdict, they only state that they do not believe that *Watson* had any improper views in what he did; the court and the jury may have determined right upon the evidence before them, and yet the justice of the case may be the other way, although the defendants cannot prove it by legal evidence.

ASHHURST, J.—If the only charge alleged against the defendants were the mispending of the corporation money, I should have been of opinion that the information ought not to be granted, because this is not the court in which redress could be given in such a case, but application should be made to the court of Chancery. Therefore the only question is, whether this order, which contains on the face of it the reason and the motives for granting the 2300*l.* does or does not import to be a libel on the administration of justice in this country: I am of opinion that it does; and as to the manner in which the information is to be drawn, it is not for us to dictate. With regard to the action itself, which was tried before me at *Thetford*, I cannot help saying that I have never seen a stronger or a grosser case of malice in the plaintiff. It was extraordinary that the prosecutor of the indictment for perjury against *Hurry* should have taken only part of the oath as the foundation of the charge, and should have omitted the remainder which was the explanation of what was before sworn: but it does not rest there; for it is stated in the affidavits that the instant the trial was over, the defendant *Watson* drew up an advertisement importing that *Hurry* had been acquitted on account of a defect in the indictment, and that another would be preferred against

these affidavits was strongly objected to by the defendant's counsel; but

The Court, considering these witnesses as being in a great degree under the controul and influence of the defendant himself, permitted the affidavits to be read, as the persons themselves had been applied to for their

testimony, and had refused it; at the same time allowing the defendant and those persons an opportunity of answering that fact.

Afterwards the defendant was ordered to be imprisoned for three months, and to find sureties for the peace for seven years; himself in 200*l.* and two sureties in 100*l.* each.

him

him at the next assizes, which he ordered to be inserted in three or four provincial papers. It has been said that the other defendants, who concurred in making the order, might innocently have thought that *Watson* was not intentionally guilty; and was actuated by laudable motives: but in answer to that, as the greater part of the corporation were present at the trial, and as these advertisements were circulated in that part of the country, it cannot be imagined that any of them were ignorant of the real transaction. But even if they were so, still this order is improper, for in it they assert that *Watson* was actuated by motives of public justice, in preserving the rights of the corporation of *Yarmouth*: now they could not be so ignorant as to suppose that their rights to the admiralty jurisdiction were in the least degree affected by this prosecution for the crime of perjury, which had no connection with it. The assertion that he was actuated by motives of public justice carries with it an imputation on the public justice of the country; for if those were his only motives, then the verdict must be wrong. But the propriety of that verdict, as far as it respected *Watson's* conduct, was confirmed in the court of Common Pleas. This shews that his conduct was founded on malevolence; for if he had been actuated by those motives only which are stated in the order, it could not have been the subject of an action for a malicious prosecution. On the whole therefore I am of opinion that sufficient appears to the court to induce us to grant an information against all the defendants.

BULLER, J.—Nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made on courts of justice in this country. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and the jury may be mistaken: when they are, the law has afforded a remedy; and the party injured is entitled to pursue every method which the law allows to correct the mistake. But when a person has recourse either by a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself. In the present case if I thought that no information could be framed on this order to make the charge criminal

1788.

The King
against
WATSON
and Others.

1788.

The KING
against
WATSON
and Others.

minal, or that the information could not be supported by any evidence, these grounds would induce me to say in my discretion that the information ought not to be granted: but I have no doubt upon those points. Upon occasions of this sort I have never adopted any other rule than that which has been frequently repeated by Lord *Mansfield* to juries, desiring them to read the paper stated to be a libel as men of common understanding, and say whether in their minds it conveys the idea imputed. Then consider the facts in this case; it appears that there was not the least color for the indictment for perjury; the jury were of opinion that there was express malice, and they gave a verdict with large damages; on an application to the court of Common Pleas they concurred in opinion with the judge and the jury as to the propriety of the verdict. With the knowledge of all these circumstances the defendants made the order in question, manifestly alluding to the indictment, for they say "that *divers suits and prosecutions* had followed, " &c." These words obviously refer to the indictment for perjury, and the action for the malicious prosecution. They then proceed to say "that *Watson* was actuated by motives of " public justice, &c." But the judge and the jury, who tried the cause, confirmed as to their opinion by the court of Common Pleas, have said that, instead of his having been actuated by motives of public justice or by any motives which should influence the actions of an honest man, he had acted from malice. These opinions are not reconcileable; if one be right, the other must be wrong. It is therefore a direct insinuation that the court had judged wrong in all they have done in this case, and is therefore clearly a libel on the administration of justice. It has been said that the other defendants acted from compassion to *Watson*; but that cannot be collected from the order, which is not capable of any other construction than that which has been put upon it. The defendants have indeed said that they never meant to reflect on the public justice of the country: but that alone is no answer to this application. Where particular allegations are made in applying for an information, some answer must be given. If the thing charged be capable of different explanations, it is fair to take the defendant's explanation in their affidavits that they did not intend any thing wrong: but if it be only capable of one interpretation, we are not to be guided by such a general answer. I am of opinion that the information should go against all.

GROSE,

GROSE, J.—The only question is whether this be or be not a libel on the public justice of the kingdom, and whether it were not made with a view to libel *Hurry*, and to continue that vexation of which he has complained to the laws of his country. It appears to me that such an intention may fairly be collected from the order; if so, there is no case which calls more loudly for the interference of this court by way of information.

Rule absolute.

1788.

The KING
against
WATSON
and Others.

The KING against The Inhabitants of RONTON
ABBAY.

Saturday,
January 26th

TWO justices removed by an order *Elizabeth Malpass*, and *John* and *Charles* her children, from the parish of *Ec-cleshall* to the township of the monastery of *Ronton Abbey*, both in the county of *Stafford*. The sessions, on appeal, confirmed that order, and stated the following case;

Elizabeth Malpass and her children had gained a settlement within the monastery of *Ronton Abbey*. *Ronton Abbey* is an extra-parochial place, containing 4 or 500 acres of land, 350 of arable and pasture, and 50 of wood, upon which there are now three houses, one a very large farm-house occupied by *Mrs. Stubbs*; the other two small houses; one with about an acre of land to it, the other with about 4 or 5 rood to it, one of them occupied by *Thomas Miles* a hired servant of *Mrs. Stubbs* and his family, the other by *Jonathan Keeling* a day labourer and his wife; *Miles's* house being distant about a quarter of a mile from *Mrs. Stubbs's* house, and the other about the same distance. Many years ago there was a fourth house on another part of the said Abbey lands which is now down. The extra-parochial lands are called *Abbey lands*. There are other lands in the adjoining parishes of *Ronton* and *Seighford*, called *Monastery lands*, part of the said respective parishes, and contributing respectively to the relief of the poor thereof. The several paupers within *Ronton Abbey*, who have received alms, have received the same from the occupiers of lands therein. Four credible witnesses, who had lived for many years near *Ronton Abbey*, declared that they never heard it called a township or vill, nor ever heard any thing about it

When the sessions adjudge a place to be a vill by reputation, as a substantive fact, this court is precluded from going into the question; notwithstanding the sessions state all the evidence particularly, on which they formed their opinion.

1788.

The KING
against
The Inhabi-
tants of
RONTON
ABBAY.

one way or the other. In 1729 an order of removal was made, which order of removal taken from the clerk of the peace's file was in the words and figures following, to wit; [The order was directed to the churchwardens and overseers of the poor of the parish of *Seighford*, and to the overseers of the poor of the liberty of *Ronton Monastery* an extra-parochial place within the county of *Stafford*, removing some paupers from *Seighford* to *Ronton Abbey*.] There was an appeal against the order, which appeared from the clerk of the peace's books to have been quashed generally. In 1773 by another order of removal *Mary Evans* was removed from the parish of *Eccleshall* to the liberty of *Ronton Monastery*. With this last mentioned order *Thomas Bowers* who was then overseer of *Eccleshall* took the pauper to *Ronton Abbey*, and offered to deliver her to Mrs. *Stubbs* then resident there, who at first refused to receive her but without assigning any reason for such refusal. *Bowers* then went to a magistrate and procured another order, and then returned and delivered one copy of the order and the pauper to Mrs. *Stubbs*, telling her if she did not receive her, she should be liable to a penalty of 5*l*. Mrs. *Stubbs* received her, and there was no appeal against this last mentioned order of removal, nor did the pauper ever come back into the parish of *Eccleshall*. In the year 1779 there was another order of removal by which *William Keeling*, *Elizabeth* his wife, and their four children, were removed from *Gnosall* to *Ronton Abbey*. *Willing Starting*, the overseer of the parish of *Gnosall*, went to *Edward Stubbs* the son of Mrs. *Stubbs*, then residing with his mother the above-mentioned *Alice Stubbs*, with the pauper and this last-mentioned order; the said *Edward Stubbs* said we have no overseer residing here, but we have appointed *Thomas Addison* our overseer, and directed him to *Addison's* house, who then resided at *Eccleshall* about a mile distant from the Abbey, but rented some of the Abbey lands. *Starting* then went and delivered the paupers to the said *Thomas Addison* who was then overseer of *Ronton Abbey*. Notice of appeal was given by *Addison* to the parish of *Gnosall* against this last-mentioned order. The appeal was afterwards heard, and it appeared in evidence that *Ronton Abbey* did not at the hearing of the said appeal set up the defence of their not being liable to maintain their own poor; but the appeal was quashed upon the merits. Constables and surveyors of the highways had been frequently appointed for the

the Monastery lands, but they never had any jurisdiction over the Abbey lands; and it did not appear that any constable or surveyor had ever been appointed for the Abbey lands. *Mary Keeling* aged eighty-nine years and her husband lived within the abbey sixty years ago, and he rented a tenement there sufficient to gain a settlement. The said *Mary Keeling* after the death of her husband, being distressed, upon application to *Mrs. Stubbs* has been for several years relieved by a piece of land which she let for twenty-eight shillings a-year so long as she lived in the abbey, and by a quarterly payment of fifty-two shillings a-year since she went into the parish of *Penkridge*; it appeared also that some of her family had been occasionally relieved by the above-mentioned *Thomas Addison*. The sessions adjudged this place to be a vill by reputation, and confirmed the order of removal, subject to the opinion of the court of King's Bench.

The Court were of opinion that, as the sessions had adjudged, as a fact, that this was a vill by reputation, they were precluded from going into that question. On which the counsel on both sides said it was intended to be argued as if the sessions had adjudged it to be a vill by reputation *on the evidence stated* in the case. But *the Court* observed that the sessions were not to state cases for the purpose of taking the opinion of this court *on facts*; and that in this case they had distinctly adjudged this place to be a vill. Therefore without argument

The rule for quashing the order of sessions was discharged.

DOE, on the Demise of VESSEY against WILKINSON and Others.

Monday,
January 28th

EJECTMENT for the manor of *Norlees*, otherwise *Northlees*, and for other premises, in the parishes of *Hathersage*, and *Darley*, in the county of *Derby*, tried before *Gould, J.* at the assizes for *Derby*, when a verdict was taken for the plaintiff subject to the opinion of this court on the following case;

Mary Wilkinson, widow of *John Wilkinson*, previous to her intermarriage with her first husband *George Wall* (when *Mary Staley*, spinster,) was seised in fee of all the premises in question (except

1788.

The KING
against
The Inhabitants of
RANTON
ABBAY.

1788.

DOE
against
WILKINSON

(except three closes, part of the *Hatbersage* estate, and the premises comprizing the *Darley* estate, which were purchased by *George Wall*, after his intermarriage with the said *Mary Staley*) and which premises, of which she was so seised, were after her said first marriage, in consequence of marriage articles, dated 24th *February* 1746, made previous to her said marriage with said *George Wall*, by indenture bearing date 31st *December* 1748, and a fine levied of them in or of *Michaelmas* term, 22 *Geo.* 2. duly vested in and settled on the said *George Wall* in fee. *George Wall* died intestate on the 20th *January* 1753, leaving issue an only daughter, *Anna Maria Wall*, who on the 1st *May* 1762 died an infant and without issue; by which *John Wall*, the brother and heir at law of the said *George Wall*, also became heir at law of the said *Anna Maria Wall*. By indentures of lease and release dated 12th and 13th *July* 1762, made after the decease of the said *George Wall* and *Anna Maria Wall*, the release of seven parts between *Mary Wall*, widow of the said *George Wall*, of the first part, *John Wall* the younger, only brother and heir of the said *George Wall*, and heir at law of *Anna Maria*, only daughter of the said *George Wall*, of the second part, and divers other persons therein named of the five other parts respectively, after reciting the marriage articles, settlement, and fine, all the premises in question were settled to the use of *Mary Wall* the widow for life, *sans waste*, remainder to trustees for a term of 500 years upon the trusts after mentioned, remainder to the use of *John Wall* for life, remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of *John Wall* successively in tail, with remainder to his daughters in tail, remainder to *Mary* in fee. After the execution of the settlement of 1762 *Mary Wall* the widow in *December* 1763 intermarried with *John Wilkinson*, by whom she had issue only one daughter, *Mary Wilkinson*. *Mary Wilkinson* the widow in her will dated 1st *October* 1770, properly attested, After reciting the settlement of 1762, declared; the trust of the said term of 500 years to be “that if her said
“brother *John Wall*, or any issue of his body, should be living at the
“time of her decease, then the said trustees were immediately af-
“ter her decease, out of the rents and profits of the said premises,
“or by mortgage thereof, or otherwise as they should be advised,
“to raise and levy the sum of 1000*l.* with lawful interest for the
“same from her death, and pay the same at the end of six
“months

“ months next after her decease, to such person or persons, and to
 “ such uses, as she by any deed or will should direct, limit, and
 “ appoint, proceeded thus; Now I, the said *Mary Wilkinson*, by
 “ means and virtue of the power above mentioned, and by virtue
 “ also of all and every other power and powers, enabling me
 “ hereunto, do in the case last above mentioned (that is to say)
 “ *If my said brother Mr. John Wall, or any issue of his body be*
 “ *living at the time of my death*, direct, limit, and appoint, that
 “ the said trustees shall and do pay the said sum of 1000*l.* and
 “ the interest due for the same, after they shall have raised and
 “ levied the same, unto my son-in-law, Mr. *Allwood Wilkinson*,
 “ his executors, administrators, and assigns, he or they giving
 “ his or their bond as security for the payment of the several
 “ annual and other sum and sums of money next hereinafter
 “ mentioned, to the several persons hereinafter named (that is
 “ to say) to my aunt Mrs. *Ann Vessey* or her assigns, for and
 “ during the term of her natural life, one annuity or yearly sum
 “ of 20*l.* of lawful money of *Great Britain*, in discharge of two
 “ several yearly sums of 10*l.* each, already secured to her by my
 “ two bonds, and also a further annuity or yearly sum of 12*l.*
 “ of like lawful money, for and during the term of her natural
 “ life, by four equal quarterly payments; and after the decease of
 “ the said *Ann Vessey*, for the payment of one annuity or yearly
 “ sum of 10*l.* of like lawful money, unto *Martha Vessey*, daugh-
 “ ter of the said *Ann Vessey* or her assigns, during the natural life
 “ of the said *Martha*, in discharge of the like yearly sum men-
 “ tioned in and secured by one of the said bonds entered into
 “ by me to the said *Ann Vessey* her mother; and also for the
 “ payment of 50*l.* a-piece to the trustees. *And in case nei-*
 “ *ther the said John Wall, nor any issue of his body, should hap-*
 “ *pen to be living at the time of my decease*, by which event the
 “ said manor by virtue of, and under, the limitations in the said
 “ recited indenture of release and settlement will devolve upon
 “ me and my heirs; Then I do hereby give and devise the same
 “ premises, and every part thereof, unto the said trustees, their
 “ executors, administrators, and assigns, for and during the term
 “ of 500 years, in trust that they *immediately after my decease* do
 “ and shall by mortgage of the said premises, or some sufficient
 “ part thereof, or otherwise as they shall be advised, *raise and*
 “ *levy the said sum of 1000 l. with lawful interest for the same*
 “ *from my death, and pay the same, within six months after my*
 “ *decease,*

1788.

Doe
 against
 WILKINSON

1788.

Do
against
WILKINSON.

“ de cease, unto my said son-in-law *Allwood Wilkinson*, his execu-
 “ tors, administrators and assigns, he or they giving his or their
 “ bond security for the payment of the said several annual and
 “ other payments herein before mentioned to be paid by him
 “ in case the said other sum of 1000 *l.* payable upon the contin-
 “ gency before mentioned, had become payable and been paid as
 “ aforesaid; and, in further trust, that they, the said trustees
 “ do, and shall, by the ways and means aforesaid, raise and levy
 “ the further sum of 1000 *l.* within six months next after my de cease,
 “ and pay the same as follows (to wit) 200 *l.* part thereof to
 “ Mr. *John Vessey*, grandson of my said aunt Mrs. *Ann Vessey*;
 “ 200 *l.* other part thereof unto and to be equally divided be-
 “ tween and amongst the child and children which shall be
 “ then living, of Mrs. *Sarah Radford* deceased, daughter of my
 “ said aunt *Vessey*; and 200 *l.* a-piece, remainder of the said
 “ 1000 *l.* unto the said *Martha Vessey*, and to Mrs. *Elizabeth*
 “ *Gilbert* and Mrs. *Ann Hill*, other daughters of my said aunt
 “ *Vessey*; and in case of the deaths of the said *Martha Vessey*
 “ *Elizabeth Gilbert* and *Ann Hill*, or any of them, leaving issue
 “ of their bodies before the said several sums shall become due
 “ and payable to them respectively, then I give the legacy or
 “ legacies, sum or sums of money, of her or them so dying unto
 “ and equally to be divided between and amongst her or their
 “ respective children, which shall be living at the time the same
 “ shall become payable as aforesaid, share and share alike; and
 “ from and after the expiration, or other sooner determination,
 “ of the said term, and subject thereto, I give and devise the said
 “ manor, &c. unto my mother Mrs. *Martha Staley* and her as-
 “ signs, for and during the term of her natural life, and from
 “ and after her de cease I give and devise the same unto my
 “ daughter *Mary Wilkinson*, her heirs and assigns for ever; but in
 “ case my said daughter *Mary* shall happen to depart this life be-
 “ fore she shall attain her age of 21 years, and without leaving issue
 “ of her body lawfully begotten, who shall attain that age; then I
 “ give and devise the said premises, and every part thereof, with the
 “ appurtenances, unto my said son-in-law, *Allwood Wilkinson*, his
 “ heirs and assigns for ever; he or they paying thereout, within
 “ six months next after he or they shall come into and be in
 “ possession thereof, the several sums of money following (to wit)
 “ the sum of 100 *l.* a-piece unto the said ten persons (therein
 “ named;) also I give and bequeath all the rest, residue, and
 “ remainder

“ remainder of my estate and effects, of what nature or kind forever, and wheresoever, as well real as personal, unto my said daughter *Mary Wilkinson*, her heirs, executors, administrators, and assigns for ever;” subject to her debts and funeral expenses. The 6th of *November 1770* *Mary Wilkinson* the widow died, without altering or revoking her said will. In *June 1773* *John Wall*, the brother of *George Wall*, who survived the said *Mary Wilkinson* the widow, died without issue. In *October 1784* *Mary Wilkinson*, the daughter, also died, an infant, unmarried, and without issue. In *August 1771* *Martha Staley*, the mother of the testatrix *Mary Wilkinson*, died. The 15th of *June 1780* *Allwood Wilkinson* also died, and the defendant *Isaac Wilkinson* is his heir at law. The lessor of the plaintiff, *John Staley Vessey*, is heir at law to the testatrix *Mary Wilkinson*, and heir at law on the part of the mother to the said *Mary Wilkinson* the daughter. The question in this case is, whether, under the circumstances above stated, the plaintiff is entitled to recover or not?

After two arguments at the bar by *Hill*, Serjeant, and *Clarke*, for the plaintiff, and *Erskine* and *Balguy* for the defendants, judgment was given for the plaintiff.

There being a difference of opinion on the bench in this case,

GROSE, J. began.—The question is, whether the estate, for which this ejectment is brought, passed as devised under the will of the testatrix to the defendant *Isaac Wilkinson*, in right of *Allwood Wilkinson*, or to the plaintiff, as heir at law of the testatrix, or of her daughter. To defeat the heir, it must appear to be the clear intention of the testatrix, collected from the will, either by express words, or necessary implication, that the devisee should take. Does it then appear, under the circumstances that have happened, to be the clear intention of the testatrix that this estate should pass to *A. Wilkinson*? I will consider what estate she had in the premises; who were the chief objects of her bounty; and how she has expressed her intention relative to this estate; and from thence form my conclusion, whether it appears, under the circumstances that have happened, that *A. Wilkinson* should take it. She had an estate for life, with a remainder in trustees for 500 years, to enable them, in case *John Wall* or any of his issue should be living at her death, to raise 1000*l.*, and pay the same at the end of six months after her death

1788.

Doz
against
WILKINSON

1788.

DoE
against
WILKINSON

death to such persons as she by deed or will should appoint. Then she had a further remainder in fee, expectant upon the determination of an estate for life in *John Wall*, and of an estate tail in his sons and daughters. Her relations were her mother, daughter, son-in-law *A. Wilkinson*, the person under whom the defendant claims, her aunt *Ann Vessey*, her cousin *Martha Vessey*, her brother-in-law *Richard Wilkinson*, the trustees, *John Vessey* grandson of *Ann Vessey*, the children of *Sarah Radford*, daughter of her aunt *Ann Vessey*, and three other daughters of *Ann Vessey*. With this interest and these relations she made her will; in which she recites truly the power vested in her of raising 1000*l.*, and under that power, in case *J. Wall* or any issue of his body should be living at the time of her decease, devised to trustees this 1000*l.* for the benefit of *Ann Vessey*, *Martha Vessey*, her trustees, and her brother-in-law, in the manner described in her will. Then having disposed of this term in case it should exist, she proceeded to dispose of the fee simple of the estate in case that should devolve upon her. Now let us look more accurately into her interest in this estate, and see what the interest vested in her was. There was vested in her a remainder in fee expectant on the determination of an estate for life in *John Wall*, and of an estate tail in his sons and daughters. This remainder might be vested in possession at the time of her death, or it might vest after her death in her heir or devisee at some remote period of time. It was in her power to devise the estate whenever it should vest, or to dispose of it only in case it should be vested in her at the time of her death; in which latter case the estate, if it did not vest before her death, would be undevised and go to her heir at law. Did she then mean to dispose of it in the latter case only, namely, if it should vest in possession before her death; or did she mean to dispose of it to her devisees, let it vest when it might, at any remote period of time, whenever that might be, that is, when the estate for life and the estate tail should be spent? Here I read again the words of the devise, which are very material; “And in case *neither the said J. Wall, nor any issue of his body, should happen to be living at the time of my decease*, by which event the said manor, &c. will devolve upon me and my heirs, *then* I give, &c. unto the said trustees, to raise the said sum of 1000*l.* immediately after my decease, &c. and in further trust to raise 1000*l.* within six months next after my decease, &c. Then she devised to her mother for life, to her

her daughter in fee, but if she died before twenty-one without issue, then to *A. Wilkinson* in fee. These being the words of the devise, let us consider whether they are applicable to, or denote, a disposition of an interest or remainder that should vest at any remote period of time, or that should be vested in possession before her, the testatrix's, death. The will positively says in direct words, "*in case neither the said J. Wall nor any issue of his body should happen to be living at the time of my decease, then I give,*" &c. Now here the contingency is directly and clearly without any ambiguity expressed. The contingency on which they were to take was, that of neither *J. Wall* nor any of his issue being alive at her decease; not on his dying without issue at any remote period of time. This is express and direct: and as the words are clear, plain, and admit of no ambiguity, before I can consent that the operation of them shall be controlled, I must be convinced that her intention was different, and that she did not mean what she has expressly said. It seems to me that the intention to be collected from these words is confirmed by what follows; The first trust on this contingency was, that the trustees should immediately after her decease raise the *said sum* of 1000 *l.* by a term substituted for and in lieu of the former term; and the money was applicable to the same purposes. It is called the *said sum* of 1000 *l.*, which proves that this was in lieu of the other sum; and it was to be raised *immediately*; how could it be raised immediately, unless the contingency was that of *J. Wall* and his issue ceasing before her death? And the 1000 *l.* with lawful interest from her death is to be *paid within six months after her decease*. This clearly was upon the idea of the interest being vested in possession before her death. Then the next provision is, that the trustees levy a further sum of 1000 *l.* When is this 1000 *l.* to be raised? Not at any future time whenever the remainder may happen to vest in possession, but within six months after her decease; 200 *l.* of which is payable to the children of *S. Bradford*, who shall be *then* living, namely, within six months after her decease. It is impossible to conceive that she meant to give the children of *S. Bradford* this 200 *l.* when the estate tail should at some future time be spent; if this had been her idea, she would have expressed it in very different language, and given it to them if living, or their representatives if dead, when the estate should vest: but on the contrary she considered it as a sum which

1788.

DOE
against
WILKINSON.

1788.

Dox
against
WILKINSON.

would at a certain time after her death become payable. The same observation is also applicable to the legacies given to the daughters of *Ann Vessey*. The next observation that arises is upon the devise of the fee subject to the term. First, the estate is given to her mother, who probably at that time was an old woman, for life: it is true it might be so devised, and well devised; but in the way in which it is devised, it is much more probable that the testatrix considered herself as giving an estate which would be vested before her death, than an estate which under circumstances might never vest at all. She then gave the fee to her daughter, and, in case she should die before twenty-one, to *A. Wilkinson*, his heirs and assigns, he or they paying 100*l.* to each of the trustees, and eight others, *within six months* after *A. Wilkinson* or his heirs or assigns should come into possession. The observation here is as before, that she did not give it to them or their representatives, but speaks of them as persons who, if living, were certainly to take within six months after the death of the mother, and the daughter under twenty-one. These are the observations upon the dispositions in the will, which satisfy me that the testatrix's real intention was, what she has declared in words, that the contingency on which the mother, daughter, and *A. Wilkinson*, were to take was, in case neither *J. Wall* nor any of his issue should be living at the time of her death; and that it was not in her contemplation to dispose of it in case *J. Wall* and his issue should die at any future period of time after her death, namely, when the estate tail in the children of *J. Wall* should be spent.

I will now consider the arguments adduced for the defendant. His counsel agreed that it depends upon intention; I have so considered it. They say that she first devised all she could, if the remainder in fee never took effect; that is true. Secondly, they say, she then devised the remainder in fee whenever it should vest in possession; and to prove this proposition they resort to the clause which says, "and in case neither the said "*J. Wall* nor any issue of his body should happen to be living "*at the time of my decease,, by which event* the manor, &c. "*by virtue of and under the limitations in the said recited indenture of release and settlement will devolve upon me and "*my heirs, *then I give and devise the same, &c.,*" and they argue that, by the words "*by which event, &c.*" she meant to devise it if by *any* event the fee should devolve upon her and her

her heirs. It is true indeed that the latter words alone are open to such a construction: but the whole must be taken together; and in reading the whole together we must observe that she expressly gave her estate in the event of neither *J. Wall* nor any of his issue happening to be living at the time of her death. It is true she goes on to say "by which event, &c."; and it is as true that by that event, namely, of neither *J. Wall* nor his issue being living at her death, the fee is in her disposal. And I consider the meaning of the words to be "by which event the fee will be vested in possession and I shall then have the power of providing for my relations," which, she afterwards does. If the construction contended for by the defendants' counsel were to prevail, the words "happen to be living at the time of my decease" must be totally expunged: and in their stead must be inserted "in case *J. Wall* should die without issue, or his issue should at any time fail, by which event," &c. But in my construction of the will I strike out no words; and in letting them all stand I give them their operation, and consider her as describing in words an event in which the fee will devolve upon her. And I read it thus; if the event shall happen of *J. Wall* and his issue dying in my life-time, by which the manor and premises in question by virtue of the limitations in the settlement will devolve upon me in fee, then I give and devise, &c. The words are equally at least as open to this construction as the other. But let us see how the construction contended for by the defendant's counsel will tally with the rest of the will: Mine agrees with every word of the will. The operation of their construction is to give the fee, whenever it shall devolve at any future period of time when the issue of *J. Wall* might be extinct. In the first place such a construction is totally inconsistent with the trust of the term for 500 years, by which the 1000*l.* is to be immediately raised, and substituted for the term given by the settlement; for under that term the trustees are to raise 1000*l.* immediately, and pay it within six months after her decease. It is as inconsistent with the further trusts of the term, by which another sum of 1000*l.* is to be raised; for that is likewise to be paid within six months after her decease. It is not very consistent with the devise to the mother for life, nor with the injunction on *A. Wilkinson*, to pay, within six months after he shall come into possession, 1000*l.* to persons now in being, without attending to their

1788.

Do
against
WILKINSON.

1788.

DOE
against
WILKINSON.

representatives: but that might be. This difficulty however is seen, and an endeavour is made to avoid it. They say it is true that these devises are inapplicable to the idea of her intending to dispose of this estate in case the fee should not vest till after her death, but in such case they say those devises are not to take effect, are to be struck out, and to be considered as null and void. Why should those legacies be struck out? It was undoubtedly as much the testatrix's intention that those legacies should be paid by *A. Wilkinson* as that he should take the estate: and if it were her intention that they should be paid, it must be at the time mentioned, that is, in six-months after her death; which is totally inconsistent with any construction that supposes the estate to be given by her in case it vested in possession before her death. By way of argument to prove that this construction was consistent with the testatrix's intention, it was asked whether the testatrix meant to die intestate, in case *J. Wall*, should at any future time die without issue. That I conceive is not the true question. The question is not whether she meant to die intestate, but *whether it appears upon the face of the will to have been her intention in the event which has happened to die intestate*, or to dispose of this estate; for if it does not, though she might not mean to die intestate, she has done so, and the law disposes of that to the heir which she has not disposed of. But I will meet that question, and consider whether she meant to die intestate; if she had any meaning upon the subject, she must have considered the matter in this way, by recollecting that the estate might vest in possession in her life-time by the death of *J. Wall* and his issue during her life, or, after her death, by their death at any future period. This was the only way in which she could consider the subject; recollecting then the two contingencies, the possibility of it's vesting in possession in her life, and the possibility of it's vesting at any future period, she disposed of it only in case of the first contingency; then the consequence follows, that she did not mean to dispose of it in case of the second, for, if she had, she would have done it. But it has been said that she might not be aware of her power to dispose of the estate in case it should fall by the death of *J. Wall* without issue after her death, and that, had she been so, the whole of the will shews that she would have given it to *A. Wilkinson*. If she were not aware of her power to give, she did not intend

to give that which she was not aware she could give, and then the law gives it to the heir; and we cannot take it from him: If she had known her power to dispose of it, she possibly would have given it, and probably might; but she has not said so; if we were to say so, it would be our will and not her's; we should then make the will, where it is our duty only to interpret it. Upon what construction then is the argument of the defendants founded? Upon a construction that is to vary the import of words that are clear, precise, and admit of no doubt, and which mention a contingency within a certain time, by construing them to denote a contingency that may or may not happen at any distant, remote, uncertain period, and in consequence of which legacies, clearly intended in case the estate is given away to *A. Wilkinson*, are frustrated and made void, and so much therefore of the will struck out. But the other construction is that which the words necessarily import, and with which every line in the will is consistent, and may stand. There can be no doubt therefore which of these constructions should be adopted. It is the very first rule of construction that that shall be adopted by which the whole will may have effect, and not that by which a part may have effect only, and the rest must be rejected. So that according to the true construction of this will the estate in question is devised to *A. Wilkinson*, in case neither the said *J. Wall* nor any issue of his body should happen to be living at the time of the testatrix's decease. The facts stated in the case are that *Mary Wilkinson*, the testatrix, died on the 6th November 1770, and that *John Wall* survived her; consequently the contingency, under which *A. Wilkinson* is entitled, has not happened; and therefore I am of opinion that the estate in question descends to the lessor of the plaintiff, and that he is entitled to judgment.

BULLER, J.—The case shortly is that *Mary Wilkinson* had an estate for life with a power to dispose of 1000*l.* if *John Wall* on any issue of his should be living at her death, out of a term of 500 years, vested in *Langford* and *Daintree*, with remainder to *John Wall* for life, and then to his children in tail, with remainder to herself in fee. Having this interest she by her will recited the settlement, and by virtue of the power gives the 1000*l.* in case *John Wall* or any issue of his should be living at her death to her son-in-law *Allwood Wilkinson*, subject to small annuities and charges. Then there is this clause in the

1788.

DOE
against
WILKINSON.

1788.

DOE
against
WILKINSON.

will, "and in case neither the said *John Wall*, nor any issue of
"his, shall be living at the time of my decease, by which event
"the premises will devolve upon me and my heirs, then I give
"the same to *Langford* and *Daintree* for 500 years, to raise
"the said sum of 1000*l.* and the further sum of 1000*l.* to be
"divided amongst different relations. And from and after the
"expiration or other sooner determination of the said term,
"and subject thereto, I give the premises to my mother for life,
"remainder to my daughter in fee: But if my daughter shall
"die before 21, and without issue, then I devise the same to
"my son in law *A. Wilkinson* in fee, he paying within six
"months after he shall come into and be in possession thereof
"several legacies." The rest of her estate both real and personal
she gives to her daughter, her heirs, executors, &c. *John Wall*
survived the testatrix, but is since dead without issue; and
the daughter of the testatrix died an infant, and without issue.

The question is, whether by the event of *John Wall's* surviving the testatrix the whole will became void as to the remainder in fee, or whether *A. Wilkinson* is now entitled to it.

Three points are contended for on the part of the plaintiff.
1st, That the testatrix thought she had no power of disposing of the fee unless *John Wall* died without issue in her life-time.
2dly, That if she did know she had a power of disposing of the fee, she never intended to give it, unless it fell into possession during her life.
3dly, That by construction the contingency of *John Wall's* dying without issue in her life-time, which is expressly annexed to the term, must necessarily be extended to the fee, and therefore the devise is void.

As to the first point, I am of opinion that it is impossible to suppose that the testatrix did not know the full power which she had. She has recited the settlement *verbatim*, which gives her the fee absolutely; and it would be a great act of violence to say that, though she has recited words which have a clear legal sense, and admit of no doubt, yet she did not understand the meaning of the words which she used. This is an argument which has no bounds, and would tend to subvert the plainest words. The testatrix *has said* she had the remainder in fee absolutely; she had it, and I cannot say, in direct contradiction to her own words, that she did not know she had got it. Taking that point to be clear, the second question is, whether she meant to dispose of it at all events, or only on the event of *John Wall's*

Wall's dying without issue in her life-time. It was used as an argument in this case, that the will did not begin with an introductory clause as to all her estate, and therefore no general intention to dispose of her whole property appeared. But a more general or unequivocal intention to dispose of all the interest which she had cannot be expressed, than is to be found in this will. She has given the estate in question expressly in fee, and then has added a sweeping clause as to all the rest of her estate both real and personal. Therefore she most clearly did not mean to die intestate as to any part of her property; but that whatever she possessed in the world, be it of what nature or quality it might, should pass by and under her will, and accordingly she has done so.

The third and most material question is, whether by construction the contingency of *John Wall's* dying without issue in the life-time of the testatrix, which is expressly annexed to the term, must necessarily be extended to the fee; for I admit with my brother *Grose*, that legacies under the term were not to be paid unless the remainder vested in her life. I agree that we cannot make a will for a testator, but we must expound it according to the true sense and meaning of the testator to be collected from what he has said in the will itself. I strike out no words. Upon the reading of this will I think the intention of the testatrix was, that at all events there should be a term of 500 years existing at her death for raising pecuniary legacies, and that, subject to that term, the inheritance should go to her daughter, or to *A. Wilkinson*, as far as she could dispose of it. Her wish was to give 2000*l.* amongst her other relations, and that she meant as an immediate provision for them: but in case *John Wall* survived her, she was tied down by the settlement not to give more than 1000*l.* So far necessity got the better of her will. But finding herself in this situation, she first disposes of the 1000*l.* if *John Wall* or any issue of his survive her, and then she gives the 2000*l.* if *John Wall* or any issue of his should not survive her. The creation of the term by the will was for the purpose of having a term exist after her death at all events. In one event it was to be under the settlement, in the other under the will. But the manner and purpose of creating that term are both material to be considered. 1st, As to the manner; she has given the estate to the same trustees and for the same time as mentioned in the settlement. They at all events

1788.

DOE
against
WILKINSON.

1788.

DoB
against
WILKINSON.

are to have a term of 500 years from her death, out of which they are in one event only to raise 1000 *l.* and in another event to raise the said 1000 *l.*, and 1000 *l.* more. In creating that term she manifestly had a reference in her mind to the term raised by the settlement, and therefore she has said it should be for raising the *said* 1000 *l.* and then has added 1000 *l.* more. Only one term of 500 years ever could exist; and when she afterwards in disposing of the inheritance makes use of the words "from and after the expiration or other sooner determination of the said term, and subject thereto, I give, &c." she meant only, subject to that term which should be in being at her death. She considered them only as one term; and meant that if *John Wall* died without issue in her life-time, still the trustees should have the term created by the settlement, but for more extensive purposes. The giving of the term to the same persons, for the same time, and to raise the same sum, with an additional 1000 *l.* in my opinion are strong indications of what passed in her mind, and of what she intended by the words which she has used. If this construction of the words "subject to the term" be right, it puts an end to the case; for then it is a plain devise of a remainder, subject to a term of 500 years. 2dly, The purpose for which the term is created is material to be considered. It is to make an immediate provision, and to provide portions for her near relations. The circumstance of *John Wall's* dying without issue in her life-time was material with that view; for if that did not happen, the giving money to be paid at a distant period, at the falling in of a remainder, which might not happen for fifty or one hundred years, would not have answered her design. But the same reason does not hold with regard to the remainder itself, and therefore the contingency shall not be applied to it. The contingency is sensible and wise as applied to the term, and the money to be raised under it. But it is not so when applied to the inheritance. The testatrix has mentioned it only in the beginning of the limitation of the term; she has not repeated it in the devise of the inheritance, which is made by a distinct clause, and therefore I think it must be confined to the term. The words "by which event the estate will devolve upon me and my heirs," mean only "will fall into possession;" and unless it fell into possession in her life time she could not give the legacies as she intended. If the testatrix had not interposed the trusts

trusts of the term, between the limitation to the trustees for 500 years and the devise of the inheritance, but declared those trusts by a subsequent part of the will, which she might well have done, the will would have stood thus; I give the premises to trustees for 500 years, if neither *John Wall* or any issue of his body shall be living at my death, and subject to that term I give the same to *A. Wilkinson* and his heirs. In that case though the term never took place, yet the remainder would. The order in which the trusts of the term are inserted cannot vary the true construction of the will. Considering this case on the will only, without reference to the settlement, it is in substance a devise of a remainder in fee, subject to a term, if a particular event takes place; but if that event does not happen, then without being subject to that charge. The court is at liberty to transpose and mould clauses and words in a will so as to make the whole take effect. This construction gives operation to every part of the will, and in each given event her whole estate will pass by the will, which is what she intended. But a contrary construction, in the event which has happened, will expunge all the limitations of the inheritance, even that to her own daughter, who was her only child and heir at law, and after her, *A. Wilkinson*, who seems to me to have been the next favourite object of her bounty. The period when the remainder was to vest was not a very distant expectation if the testatrix looked beyond the time of her own death; for *John Wall* was above 40 years of age (a) when she made her will, had no issue, and there was no probability of his having issue. The inheritance both on account of the value of it, and the persons to whom it is given, must have been the first object of the testatrix's consideration; and therefore it seems to me to be strange to put such a construction on the will, as shall in any event defeat the disposition of it. I think it plain that the testatrix meant to dispose of her whole property, and all her interest in that property, by her will; that her daughter, if she had lived, must have taken this remainder under the will, and, she being dead under 21 and without issue, *A. Wilkinson* is now intitled to the estate. For these reasons I am of opinion that there ought to be judgment for the defendant.

ASHHURST, J.—The plaintiff claims as being heir at law, which title must prevail, unless it is defeated by any disposition made by the will of *Mary Wilkinson*; and that will depend on

(a) This was stated at the bar in answer to a question from the bench after the argument.

1788.

DOE
against
WILKINSON.

the construction of her will. In the construction of wills the court has only a right to determine what the testator meant to do, and has actually done, upon the circumstances in his contemplation at the time of making the will; and has no right to consider what the testator might probably have done, had certain circumstances been propounded to him which he did not think of at the time of making the will. For this would not be putting a construction upon the will made, but making a will for him. Courts of law have always so far favoured the title of the heir at law, as to lay it down as a rule, that he shall not be disinherited but by a plain intention, and not by probable intention. Were we at liberty to enter into probable intention, it certainly is very likely that had the testatrix been reminded that there were other contingencies upon which her power of disposing might arise, as well as on the contingency of her brother *John* being dead, without issue, before her death, and had been asked how she would dispose of it in that event, it is very probable she might have made a disposition in substance, nearly the same as she has done upon the only contingency she had in view at the time of making her will. This on the first argument struck us so forcibly, that we were much disposed to have determined the case in favour of the defendant's claim: but I am very glad it has been argued a second time, as, upon more mature consideration, I am satisfied that this would have been an exposition of the will for her upon the contemplation of circumstances which did not occur to the testatrix herself when she made her will. But suppose the court were disposed to go this length, could we at any rate give a full effect to the testatrix's intention in every particular? Now this I apprehend we clearly could not do. For it was as much her intention to give the second 1000*l.* to the persons named in the will, as the objects of her bounty, whenever she disposed of the estate, as to give the estate itself. The first 1000*l.* which she had the power of disposing of under the settlement, she has disposed of, and the term came in *esse* immediately on her death; and *Allwood Wilkinson* became intitled to the money within six months after her death. The second term, under which alone the second 1000*l.* could be raised, is expressly limited on this condition, "and in case *J. Wall* or any of his issue are not living "at my death, then I give and devise, &c." Now that being the express condition on which the second term was to have arisen, and that contingency having not happened, the term can

can never arise. The consequence of which would be, that some persons who were the objects of her bounty would be totally deprived of the benefit intended, and those who took the estate would have a greater benefit than was intended them; for they would take the estate discharged of this 1000*l.* So that even if we were to put the construction upon the will contended for by the defendant's counsel, we could not effectuate the intention of the testatrix. The truth is the testatrix either did not know or advert to the circumstance of the estate coming to her disposal by any other event than *John Wall's* dying without issue in her life-time. This is plain by the limitation of the term, and the circumstance of the second 1000*l.* being made payable within six months after her death. It was competent to her to have disposed of the estate in another event which has since happened; but she has not done it; though she probably would have done it had she thought of it. This is the chance which the law gives to the heir at law. He has a right to take advantage of the slips and omissions in a will, and we cannot take it from him. I will not make any more observations, as I agree with my brother *Grose* that there must be judgment for the plaintiff.

Per curiam.

Postea to the Plaintiff.

1788.

DoB
aga. n?
WILKINSON.

MORGAN *against* HUGHES.

THIS was a special action on the case. The declaration, after stating that a dispute had arisen between the plaintiff and one *Thomas Davies* concerning the property of an ewe and a lamb, stated that *Davies*, in order that the property might be ascertained in an expeditious manner, and to avoid the delay and expence of a law suit concerning the same, applied to the defendant, who was a justice of the peace, for that purpose, and having related all the circumstances which occasioned the dispute, requested him to examine witnesses and to determine the dispute, yet the defendant, being such justice, &c. well knowing all and singular the premisses, but contriving and maliciously intending to hurt, injure, and prejudice, the plaintiff in his character, &c. and to cause him to be esteemed and reputed

Tuesday,
Jan. 29th.

Where a justice of the peace maliciously grants a warrant against another without any information upon a supposed charge of felony, the remedy against the justice is trespass and not case. A declaration in an action for a malicious prosecution for felony

ny must state that the prosecution is at an end; and alleging "that the plaintiff was discharged from his imprisonment" is not sufficient.

amongst

1788.

MORGAN
against
HUGHES.

amongst his neighbours and others guilty of theft, robbery, and felony, and to cause him to undergo the pains and penalties by the laws of this realm made and provided against robbers and felons, and to put him to great charge, &c. on the 14th of July 1786, at, &c. falsely, unlawfully, wilfully, wrongfully, injuriously, maliciously, and without any charge or accusation having been made to him the said defendant, so being then and there such justice of the peace as aforesaid, either by the said *Davies* or any other person or persons whomsoever against him the said plaintiff, of having feloniously stolen, taken away, detained, and kept, a sheep and a lamb the property of the said *Davies*, and of sheering the same in order that they should not be known, and without any other charge, or accusation whatsoever having been made to him the said defendant, as such justice of the peace as aforesaid, against him the said plaintiff, and without summoning him the said plaintiff to appear before him the said defendant, or hearing him the said plaintiff in his defence, and without any reasonable or probable cause whatsoever, and against the duty of him the said defendant, as such justice of the peace as aforesaid, made his certain warrant in writing under his hand and seal, bearing date the same day and year last aforesaid, directed to the high and petty constables of the said county of *Cardigan*, and to each and every of them, and to the keeper of the common gaol of the said county, and thereby commanded them the said constables in his majesty's name forthwith to convey and deliver into custody of the keeper the body of the said plaintiff, charged by several substantial witnesses, upon oath, before him of feloniously taking, detaining, and keeping, a sheep and lamb, the property of *Thomas Davies*, and also sheering the same in order that they should not be known, and he the said keeper was thereby required to receive the said plaintiff into his custody in the said gaol, and him safely keep until he should be delivered by due course of law; and he the said defendant, as such justice of the peace as aforesaid, afterwards, to wit, on, &c. at, &c. of his further malice against him the said plaintiff, under colour and pretence of the same supposed felony, and against the duty of his said office of such justice of the peace as aforesaid, falsely, wrongfully, unjustly, injuriously, maliciously, and without any reasonable or probable cause whatsoever, delivered and caused to be delivered the aforesaid warrant to one of the constables of the said county of *Cardigan*,

digan to be by him executed, who by virtue thereof afterwards, to wit, on, &c. at, &c. took and arrested the said plaintiff by his body, and on the same day and year last aforesaid conveyed and delivered him to the keeper of the common gaol of the said county, who then and there received him the said plaintiff into his custody, and imprisoned him in the said common gaol, and detained him there in prison according to the exigence of the said warrant; whereas in truth and in fact he the said plaintiff never was guilty of feloniously taking, detaining, and keeping, a sheep and lamb, the property of *Thomas Davies*, or of any other person whomsoever, and of sheering the same in order that they should not be known; and whereas in truth and in fact he the said defendant at the time that he granted the above-mentioned warrant against the said plaintiff, for the supposed offence herein mentioned, well knew that he the said plaintiff never had been guilty of feloniously taking, and detaining, and keeping, a sheep and lamb, the property of the said *Thomas Davies*, or any other person whomsoever, and of sheering the same in order that they should not be known, but on the contrary thereof was perfectly innocent of, and free from, any such crimes; and also whereas in truth and in fact he the said plaintiff never was accused or charged before him the said defendant, as such justice of the peace as aforesaid, either by the said *Thomas Davies*, or by any other person or persons whomsoever, of having feloniously taken, detained, and kept, a sheep and lamb, and sheering the same in order that they should not be known, or of any other felony or crime whatsoever; by reason of which said false and malicious proceedings of the defendant as aforesaid he the said plaintiff not only suffered and underwent a long and grievous imprisonment for a long space of time, to wit, from the said 14th of *July 1786* until the 1st of *September* then next following, *when he the said plaintiff was released and discharged from his said imprisonment*, but also during all that time was prevented from carrying on his trade, and was put to great expence, &c. and was hurt and damnified in his good name, &c.

To this declaration there was a special demurrer, and the following causes were assigned; that it appears in and by the said declaration that the plaintiff was committed and imprisoned by the defendant, as such justice of the peace as aforesaid, by virtue of a certain warrant issued and granted by the defendant in that behalf for a certain felony supposed to have been com-

1788.

MORGAN
against
HUGHES.

1788.

MORGAN
against
HUGHES.

mitted by him the plaintiff and on a charge thereof; and it doth not appear in and by the said declaration that the plaintiff hath ever been tried for or acquitted, or by due course of law discharged, of and from the said supposed felony and charge in the said warrant mentioned. And for that it doth not appear to the court here that the said charge or commitment for the said supposed felony was without cause. And for that the plaintiff, if he were acquitted and discharged by due course of law of and from the said supposed felony and charge, ought to have shewn and set forth in and by the said declaration that the said plaintiff was by due course of law acquitted and discharged of and from the same, and by whom, and when, and in what manner, he was so acquitted and discharged thereof. And also for that the said supposed imprisonment in the said declaration mentioned was, if committed at all by the defendant, a direct trespass and injury to the person of the plaintiff, and a false imprisonment of the plaintiff with force and arms and against the peace of our lord the king; and the plaintiff ought for such injury to have brought an action of trespass, and not an action of trespass on the case. And for that the plaintiff hath in his said declaration joined several and distinct supposed wrongs and injuries, part of which ought to be complained of, if at all, in an action of trespass, and other parts thereof in an action of trespass on the case; and hath joined several distinct causes of action which ought not to be joined in the same declaration. Joinder in demurrer.

Bower was to have argued in support of the demurrer, but the Court desired the counsel on the other side to begin.

Williams, contra, admitted that in actions for *malicious prosecutions* it was necessary to state in the declaration that the prosecution was at an end, but contended that it was not necessary in an action like the present, which was merely for a *malicious commitment*. All the cases, where it has been held necessary to shew an end of the suit, have been where the party was maliciously prosecuted in some court. The reason for this rule is given by Ld. Ch. J. *Parker* in the case of *Parker v. Langly* (a), and recognized in *Fisher v. Bristow* and another (b), that if the suit is not determined, the plaintiff may recover in the action for a malicious prosecution, and yet may be afterwards convicted of

(a) 10 *Mod.* 209.(b) *Dougl.* 205.

the original charge. But a prosecution must *ex vi termini* mean a prosecution in some court. In this case there was no prosecution; the plaintiff was neither prosecuted nor accused of felony; there could not therefore be any proceeding. For it is averred that the recital in the warrant, that the plaintiff was charged on the oath of witnesses, was false within the defendant's knowledge. Nothing more therefore was necessary to be stated in the declaration than it contains. This is like a writ for a conspiracy, in the register 134. It is not there stated what became of that action, but only that the defendant falsely asserted. That is a stronger case than the present, because the general form in conspiracy was, that the prisoner *legitimè acquietatus fuit*; yet that was not held necessary there; still less therefore shall it be so in this action on the case, which is a more liberal action. This very point has been already decided in the case of *Windbam* and *Clere* (a), where the plaintiff declared that the defendant, as justice of the peace, &c. maliciously granted a warrant against him, alleging that he was accused of stealing a horse, by which he was arrested, whereas in truth he was never accused, nor did steal the horse; and the defendant knew him to be guiltless: after verdict it was held by *Clench* J. and *Gawdy*, J. that the action was maintainable. And they said that "if a man be accused to a justice of the peace for an offence, for which he causeth him to be arrested by his warrant, although the accusation be false, yet he is excuseable; but if the party be never accused, and the justice of his malice and own accord cause him to be arrested, it is otherwise;" and judgment was given for the plaintiff. The same case is also reported in 1 *Leen*. 187. It cannot be contended that the objection did not occur in that case, for the rule, that the event of the prosecution must be stated in a declaration, was laid down in 2 *R.* 3. 9. *pl.* 22. And notwithstanding the case of *Windbam* v. *Clere* appears to have been before the court after verdict, yet if the objection could have prevailed at all, it would equally have prevailed after verdict; for the statute of Jeofails of 18 *El.* c. 14, which was the last before that determination, would not have cured a defect in substance. 5 *Co.* 34. *b.* If the case of *Skinner* v. *Gunton* and others (b), which was an action for maliciously holding to bail, be cited to shew that this objection cannot be taken after verdict, and that it was not taken in *Windbam* and

1788.

MORGAN
against
HUGHES.(a) *Cro. El.* 130.(b) 1 *Saund.* 228.

Clere,

1788.

MORGAN
against
HUGHES.

Clere, because it could not have succeeded, the answer to it is, that in the interval between those two determinations, another statute of Jeofails, 16 & 17 *Car. c. 8*, was passed which cures such a defect. But if the court should be of opinion that it was necessary in an action of this sort to state that the prosecution was at an end, he insisted that it was sufficiently stated in the present case; for the declaration states "that the plaintiff was released and discharged from his said imprisonment." If this had been an action for a malicious prosecution, alleging that the defendant had been "*legitimè acquietatus*," it would have been sufficient, without adding "*inde*." *Cro. Jac.* 131. And "discharged" in this case, which is merely that of a commitment, is equal to "acquitted" in an action for a malicious prosecution. And the plaintiff could not have stated that the prosecution was at an end in any other manner.

As to the next cause of demurrer, that this (if any) is a direct injury and trespass to the person, and therefore that the action should have been trespass and not an action upon the case, he insisted that this kind of action was the proper one; for it is brought against the defendant, as a justice of the peace, for an oppression under colour of his authority and for an abuse of it. The distinction in these cases between trespass and case is this; where a person, who has any authority either by the common or statute law, exceeds his authority without any design, trespass is the proper remedy: but where a man, having authority, knowingly, wilfully, and maliciously, abuses that authority, an action on the case is the proper remedy. "As if a man be committed to gaol for debt, and the gaoler of malice lay so many irons upon him, or set him in the stocks, or keep his victuals from him, by reason whereof he is so spent that he becomes lame or hath other infirmity, he shall have an action upon the case against the gaoler." *F. N. B.* 93. *H.* For the law imposes a duty on the gaoler to keep his prisoners in safe custody, and, if it be necessary, he may keep them in fetters; but if he do so from malicious motives, he is answerable in an action on the case. So a justice of the peace, who grants a warrant against a person accused, cannot be punished in an action of trespass, though the accusation be false: but if without any accusation, and knowing the person not to be guilty, he grant his warrant, on which the party is arrested, he is liable to an action on the case by the person unjustly accused. The case of *Windham & Clere*,

Clerke is decisive on this point. This is recognised by the Lord Chief Baron *Comyns* (a) in his Digest.

1788.

MORGAN
against
HUGHES.

ASHHURST, J.—I have no difficulty in saying that the case, as cited from *Cro. Eliz.* cannot be law; if it were, it would confound all legal principles, which have governed cases of this kind. The general distinction is this; where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only: but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other. But here the act of imprisonment was by the defendant alone; for it cannot be said to be the false imprisonment of the constable, who was bound to execute the warrant of a justice having competent jurisdiction; and therefore if it were not an imprisonment by the defendant, it was not an imprisonment by any person. But where a person is committed to prison by the warrant of a justice without any accusation, some person is guilty of false imprisonment; and it must be the imprisonment of the justice, who is the immediate and not the remote cause of it. The case in *Cro. Eliz.* certainly cannot be law; it does not appear ever to have been acted under; certainly not in modern times within my experience.

BULLER, J.—The distinction between the actions of trespass and case has long been settled in the manner mentioned by my brother *Ashhurst*. The gravamen in the present case is, that the defendant personally took and arrested the plaintiff illegally and imprisoned him; this is false imprisonment, and is an immediate injury to the person of the plaintiff. It is stated on the record that the warrant was illegally granted, and it never was doubted but that in such a case trespass was the proper remedy. But even if an action on the case could be maintained here, this declaration cannot be supported. The grounds of a malicious prosecution are, 1st, That it was done maliciously; and 2dly, without probable cause. The want of probable cause is the gist of the action: but that is not stated here; for it should have been shewn on the face of the record that the prosecution was at an end. Saying that the plaintiff was “discharged” is not sufficient; it is not equal to the word “acquitted,” which has a definite meaning. Where the word “acquitted” is used, it

(a) 1 Com. Dig. 170.

1788.

MORGAN
against
HUGHES.

must be understood in the legal sense, namely, by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment, without putting an end to the suit. If indeed it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shewn a legal end to the prosecution. Neither is there any distinction between a malicious commitment and a malicious prosecution. The present is more like the case of an action for maliciously holding to bail than any other; in which case it must be shewn that there is an end to the suit. The process in a civil suit is merely to bring the party into court; and so here the warrant is to take up the party, that he may take his trial at the assizes.

GROSE, J.—declared himself of the same opinion.

Judgment for the defendant.

Thursday,
Jan. 31st.

The KING *against* The Commissioners of the LLANDILO District of Roads in CARMARTHENSHIRE.

If trustees under a road act turn a road through an inclosure, and make the fences at their own expence, and repair them for several years, they cannot be compelled to continue such repairs, unless there is a special provision in the act to that effect.

RULE calling on the defendants, who were the acting trustees for the *Llandilo* district of the roads appointed under an act 5 Geo. 3. for widening and repairing certain roads in *Carmarthenshire*, continued by an act of the 26th of Geo. 3., to shew cause why a mandamus should not issue, commanding them to cause to be repaired a wall on each side of the road, leading through the church-yard of *Llandilofour*, in the said county.

In the year 1765 an ancient road leading through the town of *Llandilofour*, which went along the outside of the church-yard, was by an order of the trustees carried through the middle of the church-yard; at which time the trustees caused a wall to be built at their sole expence on each side of the road so diverted, which they have ever since repaired till within the last three years. By a clause in the seventh folio of the act it is enacted, “that the trustees shall apply the money raised by the tolls, &c. in erecting gates and toll-houses, and repairing and widening the said roads within their respective districts, and defraying the necessary costs, charges, and expences, attending the same, and the execution of the said act.”

Bearcroft and *Williams* shewed cause against the rule, and contended that the mandamus could not be granted, unless it was

was shewn, 1st, That no other persons but the trustees were liable to repair; 2dly, That the trustees were bound to repair under the act; and 3dly, That there was no other way of trying the question relative to the liability of repairing. But 1st, It is impossible to shew that no other persons are liable to repair, because, as these walls have been erected above twenty years, a duty is thrown on the churchwardens of the parish to repair them, who may be compelled by process in the ecclesiastical court. 2dly, There is no clause in the act which obliges the trustees to repair, and without a special provision for that purpose they are not bound so to do. Their having hitherto repaired them cannot make them chargeable in future, because they have no permanent fund out of which they can be reimbursed. Besides, the trustees are a fluctuating body, and the act itself is only for a limited time. But 3dly, Even if the trustees are liable, there are other ways of compelling them to do their duty, as by indictment.

Douglas, in support of the rule, contended that no other persons were liable to repair; and that the trustees were bound to do so under this act. By common law the parishioners are only liable for the repair of *ancient* churches, &c. 2 *Inst.* 489. But they are not liable for the repairs of any new walls in the church-yard made without their consent, especially if a greater burthen is thereby thrown on them, which is the case here, for the extent of wall is doubled by the alteration. Neither can the vicar be charged with these repairs; and although his acquiescence may be urged against him, yet that was only during the time that the trustees continued to repair the wall, and before any burthen was thrown upon him. 2dly, The trustees are liable under this act of parliament. It is true that there are no words in the act relating to this particular case, because it could not be foreseen; but the general clause, prescribing the application of the tolls, obliges the trustees to defray these as well as all other expences attending the execution of the act; and the trustees themselves have put this construction on the act, for till within these three years they have always repaired these walls. These walls are to be considered as part of the road for this purpose, because the road could not have been turned through the church-yard without erecting them.

1788.

The KING
against
The Commissioners of
LLANDILO
ROADS.

ASHHURST,

1788.

The KING
against
The Com-
missioners of
LLANDILO
ROADS.

ASHHURST, J.—As no clause is inserted in the act which throws the onus of repairs on the trustees, we cannot make them liable.

BULLER, J.—We cannot make the trustees liable by implication, if the act has not expressly declared them to be so. What is meant by a road in the act is the surface over which the subjects have a right to pass.

GROSE, J.—Suppose trustees under an act of parliament make a road through private property, for which the party is entitled to satisfaction, the jury in assessing the damages must be taken to give him as much as will, besides the value of the land, indemnify the party for the expence of keeping up the fences between the road and the inclosure.

Rule discharged.

Thursday,
Jan. 31st.

The KING *against* KING and Others, Commissioners of the Land-Tax for the TOWER DIVISION of the City of LONDON.

The court will not grant a *certiorari* to remove the assessments of the land-tax. But if an information be moved for against the commissioners of the land-tax, the court will admit an attested copy of the assessment as evidence, instead of the original.

ERSKINE had obtained a *certiorari* to remove all and singular the assessments of the land tax in this district for the year 1787. It was understood that the purpose of this motion was to found an application for an information against the commissioners by whom the assessments were made.

Bearcroft moved to quash the *certiorari*, and, in supporting his rule on this day, observed that there never yet had been an instance of such a *certiorari* having issued to remove proceedings from before the commissioners of the land tax; and many inconveniences would ensue from adopting such a practice. Nor is it necessary for the purposes of justice; for if a party find himself aggrieved by an improper assessment, he may appeal against it. On the same principle of inconvenience it is, that the court have always refused to grant a *certiorari* to remove a poor rate, because the poor might starve in the mean time; and so in the case of proceedings before commissioners of sewers. Besides, there is another and a decisive objection to this *certiorari*; for the defendants are thereby required to return the original assessments, which cannot be necessary, because the parties are entitled to take copies. This therefore is not like the case of a *cer-*

tiorari to remove proceedings from before a justice of the peace, in order to see whether he has acted properly as between the parties, for there the party cannot get a copy of the conviction but upon the return.

ASHHURST, J.—There appears to be great foundation for what has been advanced against the issuing of this *certiorari*; and if we have in any instance departed from the general rule, not to grant an information against magistrates for improper conduct till all the proceedings relating to the subject are returned into this court, on account of the great public inconvenience which would necessarily follow from adhering to the general rule, it seems to me that that reason holds in the present case. For the assessments of the land tax are public proceedings; every person is entitled to take copies; so that no injury can arise to the party from our refusing a *certiorari*; but on the contrary very great public inconvenience would ensue from permitting it to issue. And for that reason the court have refused the writ in the case of a poor rate; for the poor would remain unprovided for in the mean time if it were otherwise. So here, at least as many inconveniences, or perhaps more, may be foreseen from establishing a precedent for removing the assessments of the land-tax by *certiorari*. But if we quash the *certiorari* on the grounds of public inconvenience, we must take care at the same time that the party who applied for it shall not suffer any inconvenience by quashing it. And therefore if an application be made to the Court for an information against the commissioners, we will admit an attested copy of the assessment instead of the original.

Per Curiam.

Rule absolute.

DODD *against* JODDRELL.

Friday
Feb. 1st.

THIS was an action of replevin. The defendant pleaded *non cepit*, and then made cognizance as bailiff of J. Horne. The plaintiff after taking issue on *non cepit*, and traversing the defendant's being bailiff of J. Horne, pleaded two pleas in bar; the first, a licence to him from J. Horne to put his cattle in the place in question; the second, that the place

Where some issues in replevin are found for the plaintiff, which entitle him to judgment, and some for the defendant, of the verdict, the defendant must be allowed the costs of the issues found for him out of the general costs unless the judge certify that the plaintiff had probable cause for pleading the matters on which those issues are joined.

1788.

The KING
against
KING
and Others.

1788.

DODD
against
JODDRELL.

in question was parcel of *Postcome Field*, and set up a right of common thereupon. The replication first traversed the licence from *J. Horne* to the plaintiff; and, secondly, protesting against the right of common, traversed the place in question, being parcel of *Postcome Field*. The first and last issues were found for the plaintiff, the second and third for the defendant. And the Judge, before whom the cause was tried, did not certify that the plaintiff had a probable cause for pleading his pleas in bar; the Master in taxing the plaintiff his costs having only deducted for the defendant the costs of the third issue,

Lane moved that the Master should be directed to allow the defendant the costs of the verdict; or at least to deduct for him the costs of the second, as well as of the third, issue. The defendant is entitled to the costs of the verdict, because no material issue was found for the plaintiff. The fourth issue, which was found for him, was not on the right of common, but on a collateral point, namely, whether the place in question was parcel of *Postcome Field*, and the defendant could not traverse both the right of common, and that the place was parcel, &c. [The Court desired him to confine himself to the second point, as they were of opinion that the plaintiff was clearly entitled to the costs of the verdict.] But at all events the Master ought to deduct the costs of the second issue for the defendant. The statute 21 Hen. 8. c. 19. §. 3. gives to avowants, in case the avowry or justification is found for them, costs against the plaintiffs as the plaintiffs would have had, if they had recovered. And it has been held that this act extends to all issues found for an avowant. *Cro. Jac.* 520. *Com.* 122. The difficulty, if any, arises from the penning of the statute, 4 An. c. 16. §. 4, & 5. where the word "avowant" is omitted, though *the plaintiff in replevin* is mentioned. The fourth section gives leave to plead several matters in bar; and the fifth provides, that "if any
"such matter, upon a demurrer joined, be judged insufficient,
"costs shall be given at the discretion of the Court, or, if a
"verdict shall be found upon any issue for the plaintiff or de-
"mandant, costs shall be given in like manner, unless the judge
"who tried the issue shall certify that the defendant, or tenant,
"or plaintiff in replevin, had a probable cause to plead such mat-
"ter which upon the said issue shall be found against him." The word "avowant" must have been omitted from mere accident; for the certificate could not be said to be given in order
to

to excuse the plaintiff from paying the costs, unless the defendant would otherwise be entitled to them. This seems to have been so considered in *Bright v. Jackson* (a). The cognizance was material for the defendant, because, if he had not established the fact of his being bailiff, the verdict must have been given against him. He was obliged to prove this by an instrument, and was put to considerable expence in maintaining the issue; and as it was found for him he ought to have the costs attending it. Suppose the plaintiff had pleaded no new matter in bar, and this issue had been found against him, the defendant would have been entitled to a verdict and the costs of it; this shews the materiality of the issue. The master has already allowed the defendant the costs of the third issue, which was found for him; and every reason, upon which the defendant is entitled to those costs, will give him also the costs of the second issue.

The Court were clearly of opinion that the defendant was entitled to deduct the costs of the second as well as of the third issue; and

BULLER, J. added—the difficulty of the Master seems to have arisen from the term “overpleading;” for he conceives that although some of the issues are found for the defendant, yet, if the plaintiff did not unnecessarily plead the matter upon which those issues were taken, and was entitled to the general costs of the verdict, the costs of those issues ought not to be deducted. But I take it that over-pleading means, pleading matter not true in point of fact, which is found against the party pleading it, and yet he is entitled to a verdict. It makes no difference whether the plaintiff in replevin pleads new matter out of the cognizance, on which issue is joined, and it is found against him; or whether he takes issue on the cognizance itself, and that is found against him. The general rule is this; where several matters are pleaded by the plaintiff, some of which are found for him, and the others for the defendant, and the plaintiff is entitled to judgment, if the judge who tried the cause certify that there was a probable cause for pleading those pleas, the Master is not to deduct the costs of those issues so found for the defendant: but if there be no certificate, the defendant is entitled to have those costs deducted for him.

Ordered accordingly.

(a) *Barnes*, 144. 4to. ed.

1788.

Done
against
JODDRELL.

1788.

Friday,
February 1st.

A. by deed executed in London for securing the repayment of money lent to B. is appointed receiver of B.'s rents in Middlesex with a pretended salary which enables him to retain usurious interest, he accordingly receives the rents in Middlesex, but settles the account in London, and there pays the balance upon which the usurious interest is allowed; the offence is completed in London, and the venue in a qui tam action for the penalty is properly laid there.

SCOTT, *Qui Tam*, against BREST.

THIS was an action for usury, laid in London, and tried at the Sittings after last Term at Guildhall, before Buller, J. Verdict for the plaintiff on the 14th count of the declaration, subject to the opinion of the court on the following case.

The contract upon which the usury arose was made, and the deed for securing the money lent was executed, in London. It was proved that the rents out of which the usurious interest was retained, and in the deduction from which the usury consisted, were received by the defendant in the county of Middlesex under a clause in the deed hereafter set forth, but the account with the allowance to retain the sums usuriously taken was settled by the plaintiff and defendant in London; and for the balance of that account a draught on a banker resident in the county of Middlesex was given in London, and a receipt for such balance was also given in London. "And whereas, in order the
" better to secure the more regular and punctual payment of the
" interest of the said principal sum of 2000*l.* hereby secured or
" intended so to be from time to time as the same shall become
" due and payable, it was agreed by and between the said parties
" hereto, previous to the execution hereof, that the said Brest
" (the defendant) should be in the receipt and perception of the
" rents and profits of the said eleven houses, messuages, or tenements hereby assigned, and that he should be paid or allowed
" as such receiver, the sum of 40*l.* a year, by way of commission
" money, for his trouble and loss of time in and about the collecting, receiving, and getting in, the same; and that after payment, or retention, of such commission money, or allowance of
" 40*l.* per annum, and of the interest that should from time to time grow due to the said defendant, in respect of the principal monies aforesaid, it was further agreed that the overplus or
" residue of the gross rents of the said premises, after such deduction and allowance as aforesaid, should from time to time
" be paid to the said Alexander Scott (the plaintiff) or his assigns,
" for his own proper use and benefit." Then followed a letter or power of attorney from the plaintiff to the defendant, empowering the latter, his executors, &c. to receive the rents of the mortgaged premises, pursuant to the aforesaid clause and agreement,

ment, and to appoint an attorney under him for such purposes. Then followed a covenant from the defendant to the plaintiff to pay over to him the balance of the rents after such deductions and retentions as aforesaid. The question for the opinion of the court is, Whether the action is laid in the proper county?

1788.

Scott
against
Brest.

Palmer, for the plaintiff, contended, that the offence was committed either in *London*, or partly in *London* and partly in *Middlesex*; in either of which cases the action was properly brought. First, it appears from the case, that the deed, by which the defendant was appointed the receiver of the plaintiff's rents, was executed in *London*, as also that the accounts were settled there, on which settlement the defendant deducted a sum amounting to usurious interest, and paid over the balance to the plaintiff in *London*. It appears that the defendant acted in a double capacity; as a receiver of rents for the plaintiff, and also as a lender of money. But in the first character he did not incur any criminality; in receiving the rents he committed no crime; if he had not received all the rents, he would have been guilty of great misconduct to his employer. And though the day after the execution of the deed he might have received rents to a larger amount than he had advanced to the plaintiff, yet he would not have been guilty of receiving usurious interest at that time, because he might afterwards have accounted for the whole sum received beyond the legal interest of the sum which he had lent. And whatever contract there may be of an usurious nature, the offence is not complete till usurious interest be actually taken. *Fisher v. Beasley*. *Dougl.* 223. So that till the settlement of the account, the defendant was not guilty of usury. Suppose long accounts existing between two parties, the items of which arose at different times, and afterwards the parties met and came to a settlement, and struck a balance, and usurious interest was taken thereupon, it would never be necessary to resort back to the time and place where the original transaction commenced, in order to find out where the usury was committed. Striking the balance of the account in this case, and giving a draught and taking a receipt for it, were equivalent to the defendant's paying with one hand the whole rents, which he had received, to his employer, and receiving from him with the other what amounted to usurious interest. Thus the offence was in point of law completed in *London*, and the action properly brought. Besides the principal part of the evidence, upon which the jury found their verdict,

1788.

SCOTT
against
BREST.

arose in *London*; and the statute 21 Jac. 1. c. 4. which requires that all actions and informations on penal statutes shall be brought in the county where the offence is committed, was founded on a maxim of law, *quod ibi semper debet fieri triatio, ubi juratores meliorem possunt habere notitiam*. But even if this offence were committed partly in one county and partly in another, *Bulwer's* case (a), which is the foundation of all the subsequent ones, decides that this action is properly brought; for it is there said, that "when one matter in one county is depending upon matter in another county, there the plaintiff may choose in which county he will bring his action."

Baldwin, for the defendant, contended that the venue should have been laid in *Middlesex*, because the offence, which consisted in taking, accepting, and receiving, usurious interest, was committed there. If indeed the defendant had only received the rents in *Middlesex*, and had not had any right to retain the sum which he did, and the plaintiff had allowed it in *London*, the action would have been properly brought; but by the deed both parties were bound, the plaintiff to allow, the defendant to retain, the rents, and apply that part in which the usury consists to the uses mentioned in the deed. The instant the defendant had received the rents, the usury was complete, because it was not in the power of the plaintiff to take the usurious interest out of the defendant's hands, he being precluded by the deed. For it was agreed by both parties that only the overplus, after such deduction and allowance, should be paid over to the plaintiff; so that the defendant must be considered to have retained the usurious interest immediately upon his receiving the rents. But even if the usury were not complete in *Middlesex* alone, this action is improperly brought, because the venue should have been laid in the county where the most material part of the transaction took place, which was in *Middlesex*. In case for rescous, where a demise of land was stated in three several vills, and the venue laid in *A*. the court (b) held it well laid, "because the principal affair in question, for which the action was brought, was the rescue, which was in *A*." So in case for obstruction in a way (c), which led through several parishes, and the venue from *B*., "it was adjudged good, because the obstruction, which was in *B*. was properly in issue; but if the issue had been upon

(a) 7 Co. 1.

(b) 1 Ld. Raym. 172.

(c) *ib.*

"the prescription, it had been otherwise." In the present case therefore as the material part, the taking, accepting, and receiving, of the usurious interest was in *Middlesex*, the venue should have been laid there.

1788.

SCOTT
against
BREST.

ASHHURST, J.—This venue is laid very properly in *London*; and I think more so than if it had been laid in *Middlesex*. In order to constitute usury there must be an usurious contract, and an usurious taking. The usurious taking is an essential ground of the action; It was so in this case. It was competent to the plaintiff to appoint the defendant receiver of the rents; and if the defendant had merely received the rents in that character, the transaction would have been perfectly innocent; so that the defendant would not have been guilty of usury if there had not been an usurious taking. But it appears from the case that not only the taking, but also the usurious contract, was in *London*. For there the contract was made by which the defendant was appointed the receiver of the plaintiff's rents in *Middlesex*, and by which he was to pay over the residue to the plaintiff; on his receiving the money in *Middlesex* he went into *London* and settled accounts with the plaintiff there, and paid him over the balance. But the money was not usuriously received by the defendant till the account was settled, and he insisted on retaining it for his own satisfaction under the agreement. But even supposing the foundation of this action to have arisen in two counties, I think that, where there are two facts which are necessary to constitute one offence, the plaintiff may *ex necessitate* lay the venue in either, according to the case cited. However it is not necessary to give any opinion upon that point, because it seems to me that in this case the usury was not complete till the account was settled.

BULLER, J. and GROSE, J.—of the same opinion.

Postea to the plaintiff.

ROBINSON against HARDCASTLE and Others.

Friday,
Feb. 1st.

*Concerning the arguments on this case in
Chancery, see 2 Bro. Chas. in Chanc. 22. 344.*
A CASE was sent by the Lord Chancellor, for the opinion of this court, in substance as follows;

By settlement on the marriage of *James Dunn*, the plaintiff's father, with *Dorothy Wright*, *Robert Dunn*, plaintiff's late grand-

Every execution of a power must have a reference to the original instrument creating

that power; and whoever claims under the execution must make title under the power itself. So that where a power was given to *A.* on his marriage with *B.* to appoint to and amongst the children of the marriage in such proportions, &c. and *A.* by will appointed to *C.* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons &c. of *C.*, and in default of such issue to *D.* another child of *A.*, it was held that *C.* took an estate tail,

father,

1788.

ROBINSON
against
HARD-
CASTLE,
and Others.

father, and said *James Dunn* conveyed to trustees, among other estates, an estate at *Great Chilton*, to hold after the marriage, and after a limitation to the use of *James Dunn* for life, and other limitations not affecting the present question, to the use of the trustees, their heirs and assigns for ever, in trust for such child or children of the body of the said *James Dunn* on the body of the said *Dorothy Wright* to be begotten, and for such estates and in such proportions as the said *James Dunn* should during his life by any deed in writing, or last will under his hand and seal, to be executed in the presence of two or more credible witnesses, direct, limit, or appoint, and in default of such appointment, or as the uses, estates, and trusts to be appointed should determine, in trust for the first son of said *James Dunn* by the said *Dorothy*, and the heirs of the body of such first son, and for default of such issue, in trust for the second and all other the sons of said *James Dunn* by said *Dorothy*, and the heirs of the body of such second and other sons successively, and in default of such issue, in trust to raise portions for daughters, and subject thereto, in trust for said *James Dunn*, and the heirs of his body, and in default of such issue, in trust for said *James Dunn* in fee. The marriage took place, and the issue of that marriage were one son, *James*, and four daughters, *Margaret*, *Elizabeth* the plaintiff, *Ann*, and *Catharine*.

Margaret married the defendant *Wright*; *Elizabeth* married *Christopher Robinson*, who is dead; *Ann* married the defendant *Michael Hardcastle*; and *Catharine* is unmarried.

Robert Dunn, and *Dorothy* the wife of said *James Dunn*, the father, died in his life.

The said *James Dunn*, the father, by his will dated 9th June 1761, properly attested, devised the estate at *Great Chilton* and *Dalton Piercy*, charged with his debts, and two annuities, one of 12*l.* to his daughter *Margaret*, another of 30*l.* to his daughter *Catharine*, and all other his real estates to the said *Robinson*, *Wright*, and *Hardcastle*, to the use of *James Dunn*, the son, for life, without impeachment of waste, remainder to trustees to support contingent remainders, remainder to the first and other sons of the said *James Dunn*, the son, in tail general, remainder to daughters, and the heirs of their bodies respectively, as tenants in common; and for default of such issue, then as to all that part of his estate at *Great Chilton* which lies

on the East side of the post road leading from *Rusby Ford* to *Ferryhill*, and all that farm at *Dalton Piercy*, called the *Out Farm*, to the use of the plaintiff in fee, and as to that part which lies on the West side, and all that part of the farm at *Dalton Piercy*, called the *Town Farm*, to the use of *Ann*, in fee; but nevertheless with power to the said *James Dunn*, the son, to charge the said estates with an annuity by way of jointure for any woman he should marry, and to appoint any part of the said estates to younger children, as a provision for them, or to charge the same for their portions, maintenance, and education; and also to grant leases under certain restrictions. The testator gave the residue of his personal estate to his son *James Dunn*; and the said *Robinson*, *Wright* and *Hardcastle* were also appointed executors, in trust for *James Dunn*, the son; but the testator afterwards by a codicil revoked that part of the will, and made said *James Dunn*, the son, his sole executor.

1788.
ROBINSON
against
HARD-
CASTLE,
and Others.

Ann Hardcastle died in the life-time of *James Dunn* the father.

James Dunn the father died on or about the 3d of *September* 1767; upon his death *James Dunn*, the son, proved the will, entered upon the estates at *Great Chilton*, and in 1769 suffered a recovery of them to the use of himself in fee, and afterwards by will devised them to the defendant *John Hardcastle*, son of defendant *Michael Hardcastle*, in fee, charged with an annuity, and also subject to the annuities before mentioned.

The said *James Dunn*, the son, died 19th of *April* 1779, leaving *Margaret Wright*, *Elizabeth Robinson*, the plaintiff, and the defendants *John Hardcastle* and *Catharine Dunn* his heirs at law.

The said *John Hardcastle*, claiming under the will of said *James Dunn*, the son, entered upon the said estate at *Great Chilton*. The plaintiff claiming all that part of the estate at *Great Chilton* under the settlement in *July* 1738, and under her father's will, in *Michaelmas* Term 1782 filed her bill against defendants, praying that *John Hardcastle* might deliver up to her the possession of that part of the estate at *Great Chilton*, devised to her, and the title deeds, and account for rents since the death of *James Dunn*, the son; or if the appointment of *James Dunn*, the father, should be deemed void, then that an account of the value of the estate so devised to her might be taken, and that she might have a satisfaction out of the rest of the real and personal estates of *James Dunn*, the father, which came to *James*

1788.

ROBINSON
against
HARD-
CASTLE,
and Others.

Dunn, the son, by virtue of the will of *James Dunn*, the father. The question sent for the opinion of the court is, Whether the plaintiff, *Elizabeth Robinson*, took any and what estate or interest under the said indentures of lease and release, and settlement of the 13th and 14th of July 1713, and the said will of the said *James Dunn*, her father, in that part of the estate at *Great Chilton*, comprized in the said settlement, which lies on the East side of the post road, leading from *Rusby Ford* to *Ferry-Hill*.

This case was twice argued; the first time on Friday, November 16th. 1787, by *Mitford* for the plaintiff, and *Graham* for the defendant; and again on this day by *Bearcroft* for the plaintiff, and *Piggott* for the defendant.

Arguments for the plaintiff. This question arises on the power of appointment given by the marriage settlement, and the execution of it by *James Dunn*, the father, by will. The limitations in that will are perfectly clear; if the testator had the power of making them, there can be no doubt but that the plaintiff would take an estate in fee after the estates for life to *James Dunn*, the son, and the estate tail to his children. But the power, under which he limited the estate, not extending to grandchildren, but being confined to children, it will be contended that the terms of the power did not enable him to make the disposition which he has done; and that either *James Dunn* (the son) is to be considered as taking an estate tail under the original settlement, in case the appointment is void, or, supposing it can have any effect, that it gives to him a like estate-tail, which was barred by the recovery; and so the devise to *John Hardeastle*, the defendant, was good. It is not contended that the powers under this settlement enabled *James Dunn* (the father) to appoint to grandchildren after an estate for life to his son; for though it was held in the *Duke of Devonshire v. Cavendish* (a) that a power to appoint to children extended to grandchildren, yet that case was attended with a circumstance which does not occur in the present, namely, that all the children were living at the time of the creation of the power: but here the power being created before the birth of the children, the appointment to grandchildren could not be good, and it is admitted that the power must be absorbed among the children of the marriage. But the appointment to the first and other

(a) 1 Bl. 22 Gr. 3. D. R.

had

sons of *James Dunn*, the son, was absolutely void, and as if it had never been inserted in the will, and therefore the remainder to the plaintiff in fee was accelerated. When this case was argued in Chancery, the Lord Chancellor inclined to this reasoning. There is no rule of law more clearly established than this; that where a precedent devise is originally void, or becomes so by any subsequent event, the remainders over, not depending upon it as a condition, shall take effect as if no such devise had been made. *Hodgson v. Ambrose*, Dougl. 323. *Fuller v. Fuller*, Cro. Eliz. 422. Bro. Abr. Devise, pl. 5. It is true indeed that in those cases the devise became void by an event subsequent to the making of the will, namely, by the death of the first devisee. But it is equally the same if the incapacity of the first devisee exist at the time of making the will, as in the instance of a devise to a monk, or to a person not in esse. 9 Hen. 6. 24. b. 2 Rol. Abr. 415. pl. 6, 7. Plowd. 414. *Goodright v. Cornish*, Salk. 226. *Scatterwood v. Edge*, Salk. 229. The reason of this doctrine is that a remainder is so much of the estate as is not effectually given; and whatever is not effectually devised is as if it had never been given at all. In the present case, if the will had limited an estate tail to *James Dunn*, the son, with an immediate remainder in fee to the plaintiff, and *James Dunn*, the son, had died in the life-time of the deviser, leaving a son, the limitation to the plaintiff would have taken place immediately, on the authority of *Hodgson & Ambrose*. Or if in such case *James Dunn*, the son, had survived, but had been incapacitated by the statutes against papists, the remainder in fee to the plaintiff would instantly have taken effect, the first devise being void. This doctrine was recognized in the Duke of Devonshire v. Cavendish; and the other point relative to the appointment to grandchildren was not the subject of the decision. There the Duke of Devonshire, under a power to appoint to children, devised one moiety to his son Lord Richard for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his son Lord George, for life, remainder to trustees, &c. remainder to his first and other sons in tail male, remainder to his eldest son Lord William in fee; and as to the other moiety, to his son Lord George, in the same manner, and with the same limitations, as were before limited to Lord Richard, *mutatis mutandis*. The Duke of Devonshire left four children, Lord William the present Duke, Dorothy Duchess of Portland, Lord Richard, and Lord George.

1788.

ROBINSON
against
HARD-
CASTLE,
and Others.

1788.

ROBINSON
against
HARD-
CASTLE
and Others.

George. On the death of Lord *Richard*, without issue, an ejectment was brought by the Duke of *Devonshire* and the Dutchess of *Portland* for Lord *Richard's* moiety; the court inclined to think that the appointment might possibly be good in it's fullest extent under the particular circumstances of that case: but they gave no decisive opinion upon that point, it being a sufficient answer to the claim of the lessors of the plaintiff, that they were not entitled to recover immediately. Lord *Mansfield* there said "the next ground, and which is sufficient to defeat the plaintiff's claim is this, even if the subsequent limitations in the will to the first and other sons in tail were void, yet as the appointment to Lord *George* for life as to one moiety originally, and as to the other moiety after the death of Lord *Richard*, was good, he is now become entitled for life to this moiety also; and that alone is a sufficient answer in this ejectment." In *Adams v. Adams* (a), under a power to husband and wife, or the survivor to appoint among children, an appointment was made to two daughters in moieties for their lives, remainder to trustees, remainder to their children in strict settlement, with cross remainders; the court were of opinion that though the wife had exceeded her power by limiting the estate to grand-children, yet that the appointment of the moieties to the daughters for life was good. And that was a stronger case than the present, as that appointment was by deed, this by will, which is entitled to greater indulgence. In *Alexander v. Alexander* (b), Sir *T. Clarke* said that an execution might be good in part and bad in part, and the excess only is void, if the boundaries between the excess and the proper execution be clear. In the present case the boundaries are distinguishable; the appointment to *James Dunn* the son for life is clearly good; the estates limited to the trustees to preserve contingent remainders, and to the first and other sons, are not within the power, and therefore void; the estate to the plaintiff in fee is good within the power, and therefore shall take effect immediately on the death of *James Dunn* the son.

The remaining objection to the plaintiff's claim is, that the words of this will ought to be so construed as to give an estate tail to *James Dunn* the son. The only case which favors such a construction is that of *Pitt v. Jackson* (c). But in the first place that was determined by the Master of the Rolls after the

(a) *Comp.* 651.(b) 2 *Vez.* 644.(c) 2 *Brew. Ch. Cas.* 51.

Chancellor had sent this case for the opinion of this court; and besides it is clearly distinguishable from the present. There, on an execution somewhat similar to the present, the Master of the Rolls said he would execute it *cy pres*; and the case of *Chapman v. Brown* (a) was cited to support it, which does not appear to warrant the decree. But it is to be observed that in the case of *Pitt v. Jackson* it was not an appointment of the land itself, but of money to be laid out in the purchase of lands to be settled to particular uses; in which cases courts of equity go greater lengths in directing the conveyances than in the construction of wills actually disposing of the land. *Hopkins v. Hopkins*, 1 *Atk.* 598. In *Papillon v. Voice* (b) a decree was made one way as to the money to be laid out in the purchase of land, and another as to the land itself. In the case of the Duke of Devonshire v. Cavendish, it did not occur to any person that the execution of the power should be construed by the doctrine of *cy pres*. The certificate of *Adams v. Adams* was wrong, if that could have been done; for there it should have been adjudged that the daughters should take estates tail in order to effectuate the general intention of the testator. In the present case it was clearly the intention of the testator that the son should take for life, and his issue as purchasers. The court therefore cannot construe this to give an estate tail to the son, in order to give effect to the intention of the testator according to the doctrine of *cy pres*; because that would be giving to him an estate which the testator never intended. The case of *Chapman v. Brown*, on which that of *Pitt v. Jackson* is supposed to be founded, was very properly determined, but determined on different grounds. There in all probability some words were omitted in transcribing the will, and it was argued that the court might supply those words, and determine according to such supposed intention of the testator: but the court determined on the precise words of the will, and did not construe it *cy pres*. There Lord Mansfield said, "A court of justice may construe a will, and, from what is expressed, necessarily imply an intent not particularly specified in words. But we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, add to a will, or supply the omissions. Lord Hardwicke, though generally liberal in construing the intent of testators, would not supply a contingency omitted in the most favourable case that could

1788.

ROBINSON
against
HARD-
CASTLE
and Others.

(a) 3 *Burr.* 1626.(b) 2 *P. Wms.* 471.

1788.

ROBINSON
against
HARD-
CASTLE
and Others.

"exist." In *Shepherd v. Shepherd* the court held that though they could not supply words in order to speak what was evidently the intention of the testator, yet when the intention appeared, and it is expressed in legal terms, they could not give the will any other construction. In the present case it is contended that the construction shall not only be against the manifest intention of the testator, but also against the legal construction of the words. By the will an express estate for life is given to *James Dunn* the son: now there has always been a strong inclination in the courts to give the real effect to the intention of every testator, where he uses the expression "for life;" and in construing such wills, if a greater estate be given, it is by operation of law merely. It appears from other circumstances too that the testator did not mean to give more than an estate for life; he seems to have understood the law and the terms which he has used, for he proceeds to give the tenant for life powers which do not belong to an estate for life; he made him tenant for life, *without impeachment of waste*, and gave him the power of making leases for a term of years, and a settlement on his wife and children and their issue. And the prior limitation to the son shews for what purpose the words "in default of issue" were used; they do not create any condition on which the subsequent limitation is to take effect; but they merely express the discontinuance of the former estate. And if the construction contended for by the defendants be adopted, this absurd consequence will follow; that as to other parts of the estate not within the power, the very same words in the will will be construed to give an estate for life to *James Dunn*, the son, and an estate tail as to this part.

Arguments for def.^{ts}

For the defendants it was urged, that the appointment by the will of *James Dunn*, the father, must be considered as part of the original settlement, and engrafted upon it; and unless it would stand good there, it cannot be good as the execution of the power under it. Now the original settlement was in 1713; by that an estate for life was limited to *James Dunn*, the father, who was then about to be married, which was not spent till 1767, being 54 years after the creation of it. Then, by the subsequent execution of the power contained in it, an estate for life was given to a person, not in being at the time when the original settlement was made, who could not alienate, and the children

children of that unborn person are attempted to be made to take as purchasers. So that that second life must also be spent, and a son or daughter of the age of 21, before any power of alienation could be exercised. Such a disposition could never have taken effect by law, if it had stood in the original settlement; because it is not permitted to a person to make an estate unalienable beyond lives in being and a limited time afterwards, namely, 21 years. Upon what principle then can it be contended that a man may appoint a deputy to do that which he could not do himself; that is, do the same thing in an indirect way, which the law would not permit to be done directly. That such an attempt to create a perpetuity is void has been repeatedly decided in various cases: but at the same time, in setting aside such dispositions, the courts have adopted another principle, and have endeavoured to effectuate the intention of the parties as far as by law could be done. In *Humberston v. Humberston* (a), where a similar attempt to this was made, the decision of the court of Chancery was governed by these two principles. For when estates for lives were successively limited to unborn children, inasmuch as this tended to a perpetuity, it was held void; but, that the intent of the party might prevail as far as the rules of law would allow, it was decreed that all the devisees in being should take estates for life, but that the limitation to the sons unborn should be in tail. This is a decisive authority upon principle. Again, in the case of *Spencer v. the Duke of Marlborough* (b), a more subtle attempt was made, but without effect, to break through the rule against perpetuities. There successive estates for lives were given to persons in being, and estates tail to the unborn children of those persons. Trustees were then appointed, and a power given to them upon the birth of those children respectively to divest their estates tail and give them estates for lives. The contrivance to evade the rule of law in that case is a strong argument to shew that, in the opinion of the learned persons who were consulted on that occasion, estates for life in strict settlement could not be given to persons not *in esse* at the time; but by an ingenious device they attempted to do indirectly what they were well aware the law would not permit to be done directly. But this attempt was frustrated in

1788.

ROBINSON
against
HARD-
CASTLE
and Others.

(a) 1 P. Wms. 332. The new edition gives a correct note of the decree.

(b) 5 Bro. P. C. 592. M. (c) .q. 12. M. 1. (d)

1788.

ROBINSON
against
HARD-
CASTLE
and Others.

the House of Lords, upon the opinion of Lord *Northampton* and all the judges. Now this is at least as strong an attempt to create a perpetuity as that was, and must therefore be void upon the same principle. And this is not at all like the cases cited of remainders to persons after estates for lives to Monks and others, who are incapable of taking at all, where the remainders are said to vest immediately; for there the remainders were vested in persons then in being, and did not depend on the precedent estates. As this appointment to the plaintiff must be taken to be part of the original deed of settlement, it is a limitation of a contingent remainder to a person not in being, dependent on other contingent remainders too remote to take effect, and therefore void. Here the limitation to the plaintiff is not to take effect till after an indefinite failure of issue of certain persons unborn; for so the words "in default of such issue" must be taken to mean: then it is not possible by the rules of law that this limitation over can take effect at all, either as a contingent remainder, or as an executory devise; not as a remainder, because, if the intermediate estates are void, the heir will take, as being entitled to every thing not legally devised away from him, and, if the preceding estates fail, the remainders depending on them must fail also; nor as an executory devise, it being too remote, as not taking effect till after an indefinite failure of issue. It may be said that the words "in default of such issue" may be expunged; but that has never been done, unless to effectuate the manifest intention of the testator; and all the cases go to that point, such as *Scattergood v. Edge* (a), and various others. Then it remains to be considered what the intent is; and of that there can be no doubt but that the testator meant to give *J. Dunn*, the son, an estate tail; for he meant that the issue of that son should inherit, and that his daughter should not take the estate out of the family; and the only legal method of effectuating that intention is by making *J. Dunn*, the son, take an estate tail, instead of an estate for life. The only case which seems in any degree to contradict such a construction is that of the Duke of *Devonshire* and others v. Lord *George Cavendish* (b); but that case was determined on other grounds, and there were also many particular circumstances which distinguish it from this. There the appointment for life to the defendant was held good, because all the tenants for life were in being at the creation of

(a) 1 Salk. 229.

(b) H. 22 G. 2. 1. 1. 1.

the

the power; and the Duke only did that which the settlor might herself have done. It has been argued too that this appointment may be good in part and bad in part; bad as to the intermediate estates, and good as to the remainder; and *Alexander v. Alexander* has been cited in order to prove the principle: but the only principle deducible from that case is that where a power is completely executed, and something *ex abundanti* is added, if the boundaries can be clearly distinguished, the execution shall be good as far as the power warrants it, and void for the residue. That principle does not apply here; for here is not a complete execution of the power in the first instance; and as the intermediate estate is bad, the subsequent limitation which depends upon it must fall also. Neither does the case of *Adams and Adams* establish the position contended for; for the principal point there cannot weigh in favour of the present plaintiff, in as much as the execution of the power was held good for the lives of the daughters in that case, and nothing was determined with respect to the subsequent limitations; and there too all the children were living at the creation of the power. But upon the authority of *Chapman and Brown*, and *Pitt and Jackson*, it is clear that *James Dunn*, the son, took an estate tail in this case; which entail being since regularly docked, the plaintiff's claim is barred.

BULLER, J. upon the first argument observed—First, that if a subsequent limitation depended upon a prior estate, which was void, the subsequent one must fall together with it. If indeed the subsequent limitation was not dependent upon the other, it might then take place notwithstanding the first was bad.

Then, as to the legality of the appointment of an estate for life to *James Dunn*, the son, under the power reserved in the settlement; every execution of a power must be coupled with the power itself, so that those who claim under the execution must derive their title from the power. Now suppose in the original settlement which contains the power the estate had been limited in the same manner that it is in the will to *James Dunn* the son for life, it would have been void; for there was no such person *in esse* at the time. Then can any estate or use which is limited by the execution be good, which would have been void if inserted in the original power. In the case of the Duke of Marlborough against Lord Godolphin in *Canc. Tr.* 33 Geo. 2. there was a clause inserted in the will, that certain trustees and

1788.

ROBINSON
against
HARD-
CASTLE
and Others.

1788.

ROBINSON
against
HARD-
CASTLE
and Others.

their heirs, on the birth of each son of the tenants for life, should revoke the uses limited in tail male, and limit the premises to them for life, with remainder to their sons in tail male. Lord *Northington* there said, "this is a clause so new as not to have acquired a name. It is a wonder that it should be a question in a court of equity, which is a jurisdiction of reason, whether though the Duke of *Marlborough* could not lock up his property in this manner himself, yet might he not deliver up the keys to another, and empower him to do it: that is to say, in other words, *non potest facere per se, sed potest per alium; non per directum, sed per obliquum*. If these innovating modifications are to be allowed, as the law is a system of wisdom, it would allow it by direct limitation, but to say this cannot be done by direct limitation, and yet to say that the thing may be done by I know not what magic, would make it a system of puerility and jargon."

After the second argument,

BULLER, J. said—that as it had not been unusual of late years to state the reasons on which the court certified to the chancellor, he should deliver his opinion immediately in open court as he had no doubt upon the question.

It is material to consider what are the limitations in the settlement, and the words of the execution; because it seems to me that there is another ground not mentioned in the argument which would render the execution void. After stating the power and the execution, he proceeded; I take it to be a clear rule of law on the execution of a power, that the execution must have a reference to the power itself: and that a person claiming under the execution takes under the deed by which the power is created; and therefore that the uses limited by the power must be such as would have been good if limited by the original deed. If that rule be law, it puts an end to the case. There are many authorities which seem to establish this rule, though none in which it is expressly laid down in terms. A distinction has always been made between articles of marriage and deeds limiting the estate to present uses. Where the whole rests in covenant, the court of chancery will direct the execution as strictly according to the intention, as they can consistently with the rules of law. It is impossible that the case of *Cusack* and *Cusack* (a) could have been determined on any other ground

(a) *Dem. Proc.* 1714. 1 *Bro. P. C.* 470.

than

than that which I have stated. That was a covenant in marriage articles that lands should be settled on the heirs male of the marriage in such manner as counsel should advise. There could be no doubt but that on such a covenant the court of chancery would have decreed a strict execution of the power according to the intention: there was no execution of it, but the House of Lords decreed an estate tail to the son, because he not being *in esse* at the time, he could not have taken an estate for life. Next, the case of the Duke of *Marlborough* is decisive. There though the same objection did not hold to the trustees themselves for their life estates, because they were all in being, yet as the object of the trust was to correct the estates tail by means of the trustees, and change them into life estates as soon as the objects came in being, the whole was held void. In *2 Wils.* 337, there is an able opinion of *Wilmot* on this point, who said that he had known a case where there had been only one child, that that child under such a power as this had been made tenant for life, with remainder in tail to its issue, but he much doubted whether it could be legally done; manifestly pointing out that if a child to whom an estate is limited under a power is not born at the time that the power is created, he can only take an estate of inheritance. The case of the Duke of *Devonshire & Cavendish* does not apply, for there, all the children were living when the power was created. And reasoning on that point it is necessary to consider how far the Court of Chancery go in cases of marriage articles. In *Alexander & Alexander*, the Master of the Rolls thought that if the power had been executed by the mother on the advancement of the daughter in marriage, it might have been supported as an execution in strict settlement, which must have been on account of the consideration and the mutual consent of the mother and daughter, but as she had not pursued that line, it could not be good as an appointment by will.

The second ground on which the plaintiff's title has been rested is, that if the intermediate limitations in strict settlement to the son are void, it shall accelerate the plaintiff's remainder in fee. But the case of *Alexander & Alexander* is decidedly against it; for the Master of the Rolls there said, that though the children could not take, yet they should prevent the limitation over. When this case was directed to be sent here the Lord Chancellor

very

1788.

ROBINSON
against
HARD-
CASTLE
and Others.

1788.

ROBINSON
against
HARD-
CASTLE,
and Others.

very properly observed, that to support this argument, the testator must be considered as intending that if the first use was bad the subsequent limitation should take place, though this seemed an extraordinary attempt to attribute to him. It would be extraordinary indeed, for then it must be said, that though the testator has expressed an intention in his will to provide for his son and his issue, the grandchild should be disinherited; which must be the consequence if the plaintiff's remainder should be accelerated. The case of *Adams & Adams* does not apply here; for there the estate was limited to daughters in being: and it is material to consider how that estate was divided. It was divided into moieties; one moiety to one daughter for life, remainder to her issue; the other moiety to the second daughter, remainder to her issue, with cross remainders. The court there say that the disposition of the inheritance to the children was void, but that the estates for life were good; that is, the estates for life to each of the sisters in their respective moieties, *reddendo singula singulis*. Here, if the remainder cannot be accelerated, it becomes immaterial whether the appointment under the power be void or not. If void, the son took an estate tail under the settlement, barred the entail by the recovery, and devised to the defendant; if not void, he took an estate tail under the will, in order to give effect to the general intent of the testator. The question whether or not the son took an estate tail under the will depends very much on the cases of *Chapman* and *Brown*, and *Pitt & Jackson*. The grounds on which the Master of the Rolls seems evidently to have gone in this latter case are decisive, although the expression attributed to him in the report is not accurately taken, namely, that the whole appointment to *Mary Smith* by the will was void, and yet that she took an estate tail under it. That determination must have been on this principle, that where there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent. The doctrine of *cy pres* goes on that principle. The Master of the Rolls grounded his opinion on the case of *Chapman & Brown*, where the court said, that as the will could not operate so as to give an estate for life to the unborn son of *Reginald*, with an estate tail to his issue, therefore that unborn son should take an estate tail.

There

There is another objection here which perhaps may render the whole execution of the power void; for *James Dunn* the father has given the estate charged with the payment of his debts which he had no authority to do. But I am clearly of opinion that *James Dunn* the son took an estate tail, either under the settlement, or under the will.

1788.

ROBINSON
against
HARD-
CASTLE,
and Others.

The certificate of the Judges was not prepared in time to be delivered to the Chancellor in this Term. Vide post. 300.

The KING against J U D D.

Monday,
Feb. 4th.

THE defendant was brought up on this day by a writ of *Habeas Corpus* from *Hertford* in order to be bailed. His commitment, being read, was as follows;

Hertford, to wit, To all constables, &c. Receive into your custody the body of *Henry Judd*, of *Stansted*, &c. herewith sent you, being charged before us, &c. by the oath of *George Swarder*, *Thomas Saville* the younger, and *Matbew Skipp*, with giving two guineas to *Daniel Wright*, late of *Albury*, in the said county of *Hertford*, on 12th May last, at *Stansted*, &c. [which *D. Wright* stands convicted of a burglary in the dwelling house of the said *George Swarder*, at, &c. at the last assizes for the said county] to disturb the dwelling house of the said *George Swarder*, at, &c. And also with giving to *Nathaniel Rand*, of *Stocking Pelham* in the said county, charcoal burner, about a fortnight after harvest last, a guinea and an half to keep on with the said *George Swarder* as the said *N. Rand* had then begun, and to do him the said *George Swarder* all the mischief he could, except killing him. And for being accessory with the said *N. Rand*, who was on 29th December last, committed to *Hertford* gaol, on the oaths of the said *George Swarder* and others, as well as upon his own confession, in wilfully and maliciously setting fire to a parcel of unthreshed wheat, in *Stocking Pelham* aforesaid, in the night of Wednesday 26th December last, which was the property of the said *G. Swarder* and which he the said *N. Rand*, hath confessed he did at the request of the said *Henry Judd*. These are therefore, &c. Signed by eleven justices.

Although it is not necessary to state in a warrant of commitment on a charge of felony that the act was done "feloniously"; yet unless it sufficiently appear to the court that a felony has been committed, they are bound to bail the defendant. Setting fire to a parcel of unthreshed wheat is not a felony within 9 Geo. 1. c. 22.

1788.

The KING
against
JUDD.

It was objected that this commitment contained no charge of felony, and therefore that the defendant was entitled either to be discharged or bailed under the *habeas corpus* act (a). With respect to the two first charges in the indictment, it was admitted, that neither of them was sufficient to detain the prisoner in custody. The latter was contended by the prosecutor to be a charge of felony within the 9 Geo. 1. c. 22. which makes it felony to set fire to any house, &c. or to any *cock, mow, or stack, of corn*. The objection to the sufficiency of this part was, that it was not charged to be done *feloniously*; and the defendant was only charged with being accessory to the wilfully and maliciously setting fire to a *parcel* of unthreshed corn, which was no offence within the statute.

Erskine, Mingay, and Garrow, for the prosecution. *Sylvester and Fielding* for the defendant.

ASHHURST, J.—However improper the defendant's conduct appears to have been upon the proceedings before the justices, yet unless it appears, upon the face of the commitment itself, that the defendant is charged with a felony, we are bound by the *habeas corpus* act to discharge him; taking such bail for his appearance to take his trial as we in our discretion shall think fit, according to the circumstances of the case. And therefore the question is, whether there is specified in this commitment such an offence as amounts to felony. It is admitted that neither of the two first charges in the commitment amounts to felony. With respect to the last charge, it is not that the defendant was an accessory with *Rand* in *feloniously*, but only *with wilfully and maliciously*, setting fire to a *parcel* of unthreshed wheat. And though it is not necessary that the word "*feloniously*" should be used in the commitment, yet it ought to appear on the facts stated to be in law a felony, and within the description of the act: now the statute has only made it felony to set fire to a *cock, mow, or stack, of corn*; and the defendant is not charged with either of these. Whatever words the legislature used, we must suppose that they knew the meaning of them: and if a justice uses the same words, we are bound to suppose that he intended them in the same sense: but if he makes use of other words, he must be more precise. Now here a *parcel* of corn is too indefinite a description. It does not come within the description of the act, and we cannot say how much it is. Twenty ears of wheat is a *parcel*. Therefore I am of opinion that

(a) 31 Car. 2. c. 2.

as the warrant of commitment does not charge the defendant with a felony, we are bound to bail him. With regard to the *quantum* of the bail; although the nature of the defendant's crime is not very accurately stated, yet as sufficient appears on the depositions returned with the commitment to shew that he has at least been guilty of an enormous offence, I think we ought to take ample security for his appearance; and that he himself should be bound in 1000*l.* and four sureties in 500*l.* each (a).

GROSE, J.—It is not necessary that the act should be charged in the warrant of commitment to be done *felonice*; it would be sufficient if on the facts stated we could not but see that the act was feloniously committed. If therefore a *parcel* of wheat, *ex vi termini*, described a *cock, mow, or stack*, of wheat, I should be of opinion that a felony was sufficiently charged in this commitment: But I think that it does not; for if in the act of removing a stack of corn from a farmer's yard to his barn, a small parcel dropped by accident, the setting fire to that parcel would not be an offence within the act of parliament. As to the sureties which we in our discretion should require; I am of opinion that the security mentioned by my brother *Ashburst* ought to be given, since we cannot but see that the defendant has been guilty of a most atrocious act.

Defendant bailed, himself in 1000*l.* and four sureties in 500*l.* each.

(a) *Baller J.* was unable, on account of illness, to attend on this or any subsequent day in the term.

ROE against COCK.

Tuesday,
February 5th.

BALDWIN shewed cause against a rule for setting aside judgment of *non pros* in this cause for irregularity. The above mentioned defendant and another were joined in the writ, and the declaration was filed against the other only. He admitted that if no proceedings had been had after suing out the writ one defendant alone could not have signed judgment of *non pros*, as in the case of *Powell v. White* (a); because it would then have been a joint action: but he contended that by the

If plaintiff declares against one of two defendants named in his writ and does not proceed against the other, the latter may sign judgment of *non pros*. So if

plaintiff serves notice of declaration, or takes out a rule for time to declare against one only, and does not proceed against the other:

(a) *Doughl.* 161.

practice

1788.

The King
against
Judd.

1788.

Roe
against
Cock.

practice of the court a plaintiff may join four persons in a writ; though the causes of action may be different against them, and afterwards sever the action by declaring against each separately. And the instant a declaration is delivered against one defendant, it becomes a separate action. Therefore in this case, as the plaintiff had severed by declaring against the other defendant alone, it was competent to this defendant to sign judgment of *non pros*. If it were otherwise, by the plaintiff's joining several defendants in a writ, no one alone could sign judgment of *non pros*, though there should be no cause of action against the others.

Gibbs, in support of the rule, said that if one of several defendants sign judgment of *non pros*, it operates as a *non pros* by all; and as it appeared that in the present case the plaintiff was actually proceeding against the other defendant, the judgment of *non pros* signed by this defendant was irregular. If the plaintiff had proceeded farther against both these defendants, and had obtained judgment against one, and the other were acquitted, that other would not be entitled to have his costs; for the statute 8 & 9 W. 3. c. 11. only extends to *trespass*; and this is an action of *trover*; and before that statute, no joint defendant was entitled to costs. That therefore is a harder case on a defendant than the present, where the plaintiff has only sued out a joint writ against both.

ASHHURST, J.—It is true, as has been suggested, that a plaintiff may join four defendants in a writ, and afterwards declare against all or only one, as he pleases. In *Powell v. White* the plaintiff had not declared; but when the plaintiff has proceeded thus far against one defendant only, it becomes a separate action; and it would be absurd to say that neither of the three other defendants could sign a judgment of *non pros*.

GROSE, J.—A *latitat* is mere process to bring the parties into court; and then the plaintiff may declare against one or more of the defendants named in the writ as he thinks fit. The Master says there have been cases where notice of declaration, and even taking out a rule for time to declare (a) against one de-

(a) *Butler v. Upton*, Trin. 9 Geo. 3. B. R. On a rule of reference to the Master to enquire into the regularity of a judgment of *non pros*, he reported that there were four defendants in the writ, who appeared by different attornies. One only signed a judg-

ment for want of declaring; and it was insisted on the part of the plaintiff that the action *prima facie* was a joint action, and therefore one defendant alone could not sign a judgment of *non pros*. But it appearing that the plaintiff had taken out a rule for time

fendant only, have been held a sufficient severance of the action, so as to entitle the others to sign judgment of *non pros*.

Per Curiam

Rule discharged.

1788.

ROE
against
COCK.

time to declare in a cause entitled "*Butler* who &c. against *Upton*" singly, though he had not served it, it was considered by the court that this was a sufficient indication of the plaintiff's intention to declare severally. And whenever it can appear that the

action is not a joint action, judgment of *non pros* may be signed by all or any of the defendants named in the writ.

Dunning, Solicitor General, opposed the report; but the court held the judgment, under the above circumstances, to be regular.

The KING against The MAYOR of COLCHESTER.

Tuesday,
Feb. 5th.

ROUS moved for a mandamus to be directed to the defendant, commanding him to admit Mr. *Grimwood* to the office of Recorder of *Colchester*. He, together with *Erskine*, who was for the rule, acknowledged that the present application was made for the purpose of trying the merits of an election, on the ground that the mayor had refused several legal votes given for *Grimwood*, and improperly admitted others given for *Smithies*, the other candidate, who was afterwards admitted and sworn into the office. They admitted that, if the validity of an election were impeached at any subsequent period, the court would not grant a mandamus to admit another person, till the officer in possession was ousted by a *quo warranto* information. But they contended that where the party praying the mandamus claimed to be admitted under the same election at which the officer in possession was supposed to be elected, the court ought to grant a mandamus, in order to try the legality of the election; otherwise it would be enabling a spurious officer, who was perhaps in possession by fraud, to impede the course of justice. In the case of the *King v. Barker* and others (a), the court granted a mandamus to admit a person who claimed under the same election with the officer in possession. The affidavits in this case state that there was a majority of legal votes for *Grimwood*. But even if the question were doubtful, a mandamus ought to be granted, in order to give the party applying an opportunity of trying the merits. In the *King v. Bloer* (b), Lord Mansfield said, "We cannot try the merits upon affidavit: he claims a right, though it is litigated; and that is sufficient for the pre-

Mandamus to admit a recorder refused, because there was a recorder *de facto*, and the party had another remedy by *quo warranto*; though both of them claimed under the same election.

(a) 3 Burr. 1265.

(b) 2 Burr. 1045.

1788.

The KING
against
The Mayor
of
COLCHESTER

"sent purpose." In a case (a) cited in 3 Burr. 1453, 4, a mandamus was granted to proceed to the election of a mayor, though there was a mayor *de facto*.

Bearcroft opposed this in the first instance, and contended that the court ought not to grant a mandamus to admit *Grimwood* to an office which was not vacant, before the validity of *Smitbies*'s election was questioned in a *quo warranto* information. In the case of the *King v. Bankes* (b), where an application was made for a mandamus to proceed to the election of a mayor of *Corfe Castle*, there being at that time a mayor *de facto*, Lord *Mansfield* said, "If the election were doubtful and fit to be tried upon an information in nature of a *quo warranto*, the court ought not to grant a mandamus; but if it were a mere colourable election, and clearly void, they ought." Now in this case there is no pretence to say that the election was only colourable, and clearly void; and therefore the present application ought to be refused, as the party praying it had another remedy, namely, by a *quo warranto* information against the officer in possession.

The Court were clearly of opinion, that it was a decisive answer to this application for a mandamus, that there was another remedy by an information in nature of a *quo warranto*, by which the title of the officer in possession could be tried as well as on a mandamus. And the consequence of granting the rule would be, that a second person would be admitted to an office which is already filled by another, both claiming to be duly elected. Therefore

The rule for a mandamus was refused; and a rule was granted to shew cause why an information in nature of a *quo warranto* should not be filed against *Smitbies*.

(a) 2 Str. 1003. See also 2 Str. 1157. and 4 Burr. 2008.

(b) 3 Burr. 1454.

The KING against The Inhabitants of PENDERRYN.

It is no objection to a *certiorari* to remove a presentment of a road made by a justice of peace under the 24th section of 13 Geo. 3. c. 78. that it is prosecuted by another than the justice presenting, if it is by his consent.

A ROAD lying within the district of *Penderryn* had been presented on 13 Geo. 3. c. 78. s. 24. by Mr. *Bevan*, a justice of the peace, as out of repair; which presentment had been removed into this court, on the part of the prosecutor, by *certiorari*.

Bevan applied on a former day for a rule to shew cause why the writ of *certiorari* should not be quashed, alleging as a ground that one *Morris* had sued out the *certiorari*, and was in truth the prosecutor, which was not allowed by the act, the only prosecutor recognized by the 24th section being the justice himself who made the presentment; and that it was not in his power to substitute any other in his stead. *Morris* could not have been the prosecutor on the presentment.

On this day *Shepherd* shewed cause against the rule, and produced an affidavit made by *Bevan*, that *Morris* prosecuted with his full consent and approbation. He urged how highly inconvenient it would be if the justice himself who presents was obliged to conduct the prosecution through all its subsequent stages. The act never intended to throw so great a burthen upon him. By the same section the justices of assize were empowered to make similar presentments; and yet it cannot be supposed that they have leisure or opportunity to pursue the prosecution.

Per Curiam. The justice is the person to whom the court look as the prosecutor; he has avowed the presentment. If he consents to the acts of any other person conducting the prosecution, he takes on him all the responsibility, and is answerable for all the costs, if the presentment should turn out to be improper.

Rule discharged.

GULLIVER *against* DRINKWATER.

Wednesday,
Feb. 6th.

THE defendant suffered judgment to go by default in this action, which was trespass for the mesne profits after a recovery in ejectment. On executing the writ of enquiry the jury gave their verdict for the rent of the premises, but did not include the costs of the ejectment. The defendant became a bankrupt after the judgment in ejectment, and before the present action was brought. A rule having been obtained to shew cause why the inquisition should not be set aside, because the jury had not given the costs of the ejectment in their damages,

Whereafter a recovery in ejectment, and before an action of trespass for mesne profits, the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict in exe-

cuting a writ of enquiry in the action for mesne profits, the court refused to set aside the inquisition, because the plaintiff might have proved the costs, as a debt, under the defendant's commission of bankrupt.

Clifford

1788.

The KING
against
The Inhabi-
tants of
PENDERRY

1788.

GULLIVER
against
DRINK-
WATER.

Clifford now shewed cause, and insisted that the costs of the ejectment were become a liquidated debt, which might have been proved under the commission of bankrupt which had issued against the defendant; and as the plaintiff had neglected to prove that debt under the commission, the court ought not to assist him by setting aside this verdict. In *Aylett v. Harford* and another (a), it was held that a creditor who had obtained a verdict before the defendant became bankrupt, might prove his costs as well as his debt under the commission, though judgment was not signed till after the commission issued. And this is a stronger case.

Walton, in support of the rule, contended that the jury ought to have given the costs of the ejectment in their verdict in this action. It is the constant practice in actions of trespass for the mesne profits for the jury to give the costs of the ejectment as damages occasioned by the trespass and the unlawful possession of the premises recovered. In *Goodtitle v. North* and others (b), it was determined that bankruptcy could not be pleaded in bar to an action of trespass for the mesne profits. If then the plaintiff be entitled to the judgment in this action, he is entitled to all the fruits of it. And it is no answer to the present application to say, that the plaintiff might have proved his debt for the costs under the defendant's commission; because, as the plaintiff had two remedies, one only of which is barred by the bankruptcy and certificate, he may pursue the other, notwithstanding the bankruptcy. *Cotterel v. Hooke*, Dougl. 93.

ASHHURST, J.—This is an application to the discretion of the court to set aside the inquisition, because the damages given by the jury are too small. There is no doubt but that the plaintiff had another remedy for the costs of the ejectment; for being a liquidated debt, he certainly might have proved it under the commission. And as he has neglected to do that, and chosen to take the chance of recovering in an oblique way more than he could have recovered in a direct manner, and has failed, I own I am not disposed to assist him. Though in many instances in actions of trespass for mesne profits the jury take into consideration the costs incurred in recovering the possession by ejectment, yet it does not appear to me, under all the circumstances of this case, that they were bound to do so here. For the statutes relative to bankrupts were made for the benefit of unfortunate

(a) 2 B'ac. 1317.

(b) Dougl. 562.

persons, who, in giving up their whole substance for a fair and equal distribution among their creditors, are entitled to be discharged of all debts due previous to their bankruptcy.

GROSE, J.—This is like a motion for a new trial which is made to the discretion of the court. Although the jury might, if they had pleased, have given the costs of the ejectment as consequential damages in their verdict in this action, yet, as the plaintiff might have proved his debt for the costs under the commission of bankrupt which has issued against the defendant, I do not think that the jury, in not including those costs in the damages, have so far done wrong as to induce us to interpose and set aside the inquisition.

Rule discharged.

The KING *against* The Inhabitants of CLIVIGER.

Wednesday,
Feb. 6th.

TWO justices removed, by an order, *James Whitehead*, otherwise *Shepherd*, and *Margery* his wife, from the township of *Anlezark* to *Cliviger*, both in the county of *Lancaster*; and on appeal to the sessions, that order was confirmed, subject to the opinion of the court on the following case,

As to so much of the order as respected the settlement of *Margery*, therein named to be the wife of *James Whitehead*. The respondents proved the marriage of the paupers, *James* and *Margery*, on the 16th September 1786, and then closed their case. The appellants insisted that *James Whitehead*, the pauper, had a former wife, *Ellen*, living at the time of his marriage with *Margery*, and called *James Whitehead* to prove it; who swore that he never was married to the said *Ellen*. The appellants then offered to call the said *Ellen*, stating her to be the lawful wife of the said *James Whitehead*, to contradict what he, her supposed husband, had sworn; and to swear that she was his lawful wife: but the sessions, under the circumstances, refused to receive her evidence. The appellants then went into evidence of cohabitation between the said *Ellen* and *James* for a period of three or four years; of declarations and acts of *James* acknowledging the said *Ellen* to be his wife, and amongst others an indenture of apprenticeship, dated 24th August 1785, was proved, by which the said *James* and the said *Ellen*, therein described to be his wife, bound out apprentice, one *Thomas*

A wife shall not be called in any case to give evidence even tending to criminate her husband. In a case of settlement where a marriage in fact had been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shews him to have been guilty of bigamy.

1788.

The KING
against
The Inhabi-
tants of
CLIVIGER.

Williams, the son of the said *Ellen*, by one *Joseph Williams*, formerly her husband, but then deceased. The question referred to the Court is, Whether the said *Ellen* was a competent witness under these circumstances or not?

S. Heywood, and *Topping*, in support of the order of sessions. The real question before the court is, Whether a wife is a competent witness, even in the case of third persons, to prove her husband guilty of bigamy? Besides the objection of her being interested in the *question* which was put to her, in as much as she was called to prove, that a person whom she called her husband was liable to her debts, and for her maintenance; there is another objection to her testimony arising from the policy of the law, which will not permit husband and wife to give evidence tending to the crimination of each other. Here the evidence of the wife went to charge her husband with bigamy. The broad rule is laid down in *Buller's N. P.* 286. where it is said, that husband and wife cannot be witnesses for each other, because their interests are absolutely the same; nor against each other, because it is contrary to the legal policy of marriage. And on this latter ground, Lord *Hardwicke*, in the case of *Barker and Dixie* (a), refused to let the plaintiff's wife be examined although it was with the defendant's consent. So in *Co. Lit.* 6. b. it is said to have been resolved by the justices, that a wife cannot be produced against her husband, for it might be the cause of implacable discord and dissention between them; and the means of great inconvenience. Sir *T. Ray* 1. 2 *Stra.* 1094. 5. The case of *Broughton v. Harpur* (b) is expressly in point. There in an ejectment tried before *Gould*, J. 13 *W.* 3. the lessor of the plaintiff made title as son and heir of *J. Jacques* and *Hannab* his wife, in right of *Hannab*. The defendant offered to call a woman to prove that *J. Jacques*, who was then living, was married to her before he was married to *Hannab*, and she was accordingly admitted. However a verdict was found for the plaintiff. But the same case, upon the very same title, between the same parties, came on again at the following spring assizes, 1 *Anne*, before *Holt*, Ch. J. when this woman being again offered as a witness to the same fact, he rejected her. But the defendant proved it by other evidence, and obtained a verdict. It does not exactly appear from the report, whether the cause came on the second time upon a new trial granted by the court,

(a) *Rep. Temp. Ld. Hardwicke* 264.(b) 2 *Ld. Raym.* 752.

though it very probably did. But at any rate it must have been on mature deliberation, and a perfect conviction of the impropriety of receiving such evidence, otherwise Lord *Holt* would not have ruled as he did, so recently after a contrary determination upon the very point, in the same case, by another judge. This case therefore has almost as much authority as a decision of the court itself. The same principle has since been strongly recognized in a late case of *Bentley and Cook* (a) in this court. There in an action by plaintiff as a feme sole, for goods sold, &c. the defendant called the husband as a witness to prove that she was a married woman, and he was admitted, and the plaintiff was nonsuited. On a motion to set it aside, the majority of the court thought, that he was not admissible on the ground of policy; *Buller*, J. doubted, at first, upon the ground that the husband was not interested in that case, but he afterwards acceded to the opinion of the court upon the broad ground adopted by them, of the impolicy of permitting husband and wife to give evidence for or against each other. It is plain that interest alone in the event of the suit is not the true criterion in cases of this sort. Where a person becomes a bankrupt, all interest ceases; and if this kind of objection had been founded merely on that ground, a wife would have been a good witness to prove effects, the property of her husband before his bankruptcy; but in *Brownl.* 47. it was ruled otherwise, and therefore it was necessary to have an act (b) for that purpose. So that the argument, which may be urged on the other side, that the husband could not be affected by this evidence, in as much as it could not be made use of on any other occasion, cannot have any weight; for if it tends in any degree to prejudice him, that is sufficient. It would certainly have raised impressions against him, and indeed it would have been the duty of the justices to have committed him after having heard it. There may possibly be some cases where a wife may give evidence on behalf of third persons, which may obliquely affect her husband, but certainly none where it tends to impute any crime to him. In trover for goods, a wife would not be permitted to say that her husband stole them, and gave them to the defendant. But a woman may prove the legitimacy of her child, because there is no interest to herself, and no crime alleged against her husband. In 1 *Hale*, P. C. 301. it is laid down, that a woman is not bound to give

1788.

The KING
against
The Inhabitants of
CLIVIGER.

(a) *Tr.* 24 *Geo.* 3. *B. R.*(b) 21 *Jac.* 1. c. 19. s. 6.

evidence

1788.

The King
against
The Inhabi-
tants of
CLIVIGER.

evidence against another in case of theft or any other crime, if her husband be concerned, though it be material against another, and not directly against her husband. Now if the charge could not be obliquely made in one instance, there is no reason why it should be in another; and there is no case in which the wife could prove the same fact in an action which she could not do in an indictment against a third person; and there is no reason for any distinction. Neither is there even the plea of necessity in this case, for the same fact might have been established by other evidence, as by the register of marriage. There is besides another objection to the evidence offered arising out of what passed at the sessions. A marriage in fact had been clearly proved between the paupers. The other side then called the husband, thinking that he would prove his marriage with another woman; but he swore that he never was married before: then the same party called the supposed wife to contradict him; so that besides calling the wife to criminate the husband, they called a second witness to contradict their first.

Bearcroft, Cockell, Serjt. and Johnson, contra. The objection in this case goes to the *credit*, and not to the *competency*, of the witness. The courts have leaned very much to this rule of late years particularly, as more conducive to the ends of justice. *Abrahams v. Bunn.* 4 *Bur.* 2251. In order to form a right opinion upon the question of competency, it is necessary to consider who were the parties; what was the matter in issue; and the question put to the witness. The parties to the cause were the two several parishes; the matter in issue was a question of settlement; which differs this from all other cases, for greater latitude is here allowed. The parties themselves, whose settlement is in question, have ever been allowed as witnesses; and therefore the parish of *Cliviger* had a right to the testimony of this woman. That being the case, and neither the husband or wife being in any degree interested in the event, the simple question is, whether a woman is a competent witness to prove her own marriage? There are many cases to that effect. *Bull. N. P.* 287. and it has always been the constant practice to call husband and wife to prove that fact. It would be a strange absurdity indeed if the event of a cause were to be decided by the circumstance of calling this or that person first, whether by accident or design. It might be turned to very bad purposes to encourage such a distinction. Great inconveniences would arise to

to third persons if they were to be struck out from receiving the benefit of another's testimony by such means. The circumstance is likely to occur frequently in the case of wills. In the case of an indictment for bigamy the first wife's evidence is not admissible because it goes to charge her husband directly. But here nothing that the woman could say could affect her husband; no prosecution could be grounded on her testimony; neither was there any benefit to herself. And as to its being the duty of the justices to commit the husband in case of such evidence having been given, it is no objection to third parties proving their case, that the justices may interfere in another shape. In the case of *Bentley & Cook*, where the husband's testimony was held to be inadmissible, he was clearly interested. One of the two cases cited from Lord *Raymond* seems indeed to support the objection; but that can have no weight, for at any rate it is only an opinion thrown out at *nisi prius* upon evidence which was unnecessarily tendered; for the same fact was established afterwards by other means; and besides it is contradicted by another case, where the facts were similar, decided the other way. As to the other objection; there is no such rule as that a party may not call a second witness to contradict his first. It is in every day's practice to do so. Sometimes indeed where several witnesses have been called by one party who give evidence against him, the judge will signify his disapprobation to his calling any more; but it would be hard indeed if the rights of the parties in a cause were to depend upon the first witness whom they happened to call. It would be an incitement to perjury, as such a witness would be worth gaining at any rate.

ASHHURST, J.—There is no doubt but that husband and wife may prove their own marriage on a question of settlement. But this case rests on particular circumstances. A marriage in fact had been proved with one woman; the question was whether she was the pauper's lawful wife. Then another woman was called to prove that she had been before married to him, and was in truth his lawful wife. That creates the doubt, whether it was competent to the wife to prove that her husband had been twice married under these circumstances: I am of opinion that she was not a competent witness to that purpose. It has been long established that the question of settlement raises no interest in the parties whose settlement is in dispute. there-

1788.

The KING
against
The Inhabi-
tants of
CLIVIGER.

1788.

The KING
against
The Inhabi-
tants of
CLIVIGER.

fore I lay all consideration of interest out of the case. For though the evidence of the woman would have gone to shew that her husband was liable to maintain her, yet that objection would have gone to her credit and not to her competency, because it would have been of no avail on any other trial. But the ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even *tend to criminate* each other. The objection is not confined merely to cases where the husband or wife are directly accused of any crime; but even in collateral cases, if their evidence *tends* that way, it shall not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury as well as bigamy; so that the tendency of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy; yet her evidence might lead to a charge for that crime, and cause the husband to be apprehended. In that point of view therefore I am opinion that her testimony ought not to have been received, because it is an established maxim, that husband and wife shall not give evidence to criminate each other. Thus far upon principle: But besides, the *Nisi Prius* case before Lord Holt seems to have great weight. For though there is the opinion of another Judge the other way, yet the one decision immediately following the other, and being between the same parties, and upon the same title, the first might have become a matter of discussion between the judges; and probably on the second trial Mr. J. Gould would have ruled it in the same manner as Lord Holt did. Upon the whole I am clearly of opinion that the objection is well founded.

GROSE, J.—In this case the wife was called professedly for the purpose of proving that her husband was guilty of bigamy. The question is, whether she was a competent witness to prove that fact. The distinction between competency and credit is by no means accurately settled; in many of the books the shade between them is so light that the boundaries of either can hardly be perceived. But in all the books which treat of evidence there are certain technical rules laid down, which are highly beneficial to the public, and ought not to be departed from. Some of these relate to husband and wife: and we find the general rule as to them to be founded, not on the

ground of *interest*, but of *policy*; by which it is established that a wife shall not be called to give testimony *in any degree to criminate her husband*: and Lord *Hale* says, that she shall not be called even *indirectly* to criminate him. And that rule seems to have governed all the decisions from that time to the present. The case in Lord *Raymond* seems very much in point. It is not merely to be considered as one *nisi prius* case contradicted by another, for what my brother *Ashburst* has observed is very apposite: and on looking into the report, I am convinced that the second case came on upon a new trial, for it says “the *same cause*” came on to be tried before *Holt*. On the first trial the objection was considered by *Gould, J.* on the ground of *interest*, and considering it merely in that light, he might have done right in overruling it: but the true and best ground of objection is not that of interest, but is founded on the political inconvenience of causing dissensions in families between husband and wife; and so it is put by Lord *Hale*. In *Hawkins Pleas of the Crown* the objection is also considered in the same view; and my Lord *Hardwicke* adopted it in the case before him. And since that time in the case of *Bentley and Cook*, the determination of three of the judges was on the broad ground of the public inconvenience arising from the admission of such testimony. Mr. Justice *Buller* doubted at first in that case because he thought there was no interest in the party whose testimony had been admitted; but on further consideration of the subject, I know that he gave in to the opinion of the other judges, upon the general principle which governed them; and he thought the rule a very proper one as it tended to prevent dissensions amongst families. Then what are the circumstances of this case as applicable to that principle; the husband was first called, and he was asked, whether he had ever been married to this woman? A strange question; to which he might have demurred; however he answered at once that he never was. Then the same party immediately called his supposed wife to contradict him, and prove him to have been guilty of bigamy. It certainly was not competent to her to prove her husband guilty of the crime of bigamy. The true line upon such occasions is the broad one, according to which a wife shall not be permitted to give any evidence tending to criminate her husband.

Order of sessions confirmed.

The

1788.

The King
against
The Inhabitants of
CLIVIGER.

1788.

Wednesday,
Feb. 6th.The KING *against* RICHARD ARCHER.

If a soldier be committed to prison for disobeying an order of bastardy till he find sureties for performing it, he is not entitled to be discharged under the mutiny act.

THE court of quarter sessions in *Worcestershire*, in April 1786, having adjudged the defendant, a soldier in the first regiment of guards, and in actual service, to be the reputed father of a female bastard child begotten on *Martha Kent* of the parish of *Upton upon Severn*, ordered him to pay 1s. 6d. weekly to the churchwardens or overseers of *Upton*, for so long a time as the child should be chargeable to *Upton upon Severn*. At the next sessions held in July 1786, the defendant was committed to the Bridewell for disobeying the order, till he should find sufficient sureties for the performance of it.

A rule had been obtained last term to shew cause why the order of sessions, by which the defendant was committed to custody for disobeying the order of bastardy, should not be set aside, because the defendant, being a soldier in actual service, was protected from being arrested for that cause under the mutiny act.

By the 63d section of that statute, to prevent, as far as may be, any unjust or fraudulent arrests that may be made upon soldiers, whereby his Majesty and the publick may be deprived of their service, it is enacted, "that no person whatsoever who is or shall be listed, or who shall list and enter himself as a volunteer in his Majesty's service as a soldier, shall be liable to be taken out of his Majesty's service by any process or execution whatsoever, other than for some criminal matter, unless for a real debt, or other just cause of action; and unless before the taking out of such process or execution (not being for a criminal matter) the plaintiff or plaintiffs therein, or some other person or persons, on his or their behalf, shall make affidavit, that to his or their knowledge the original sum justly due and owing to the plaintiff or plaintiffs, from the defendant or defendants, in the action or cause of action, on which such process shall issue, or the original debt, for which such execution shall be sued out, amounts to the value of 20*l.* at the least, over and above all costs of suit in the same action, or in any other action on which the same shall be grounded; and if any person shall nevertheless be arrested, contrary to the intent of this act, it shall and may be lawful for one or more judge or judges of such court, upon complaint thereof made, to discharge such soldiers so arrested contrary to the intent of this act."

Caldecott

Caldecott now shewed cause; and, before he considered the question whether the original charge against the defendant were or were not a crime, made two preliminary points; 1st, That the mutiny act, under which the defendant claims an exemption from being arrested, was not intended by the legislature to extend to cases of this sort; 2dly, That the disobedience to the first order of sessions was a crime, for which undoubtedly the defendant was liable to be arrested. As to the first; It appears as well from the spirit as the words of the mutiny act, that this is not a debt within the meaning of it. The preamble to the sixty-third section states that it is to prevent the unjust and fraudulent arrests of soldiers; but this is neither an unjust or a fraudulent arrest. And the enacting part only applies to cases where actions of debt or assumpsit would lie; where the debts can be ascertained: it speaks of cases where a previous affidavit of the demand can be made, where a creditor is suing, and in which costs can be recovered; which shews that it only relates to matters of a civil nature. But here no previous affidavit of the demand could be made; no creditor is suing for a debt due to him; and no costs are recoverable; and therefore it is not such a demand as is within the provisions of that statute. As this case is clearly not within the words of the act, infinite mischief and inconvenience will result from extending it by construction; for in those parts of the kingdom where the military are stationed, not only the whole burthen of maintaining all the illegitimate children will be thrown on the parish at large, but it will also tend in its consequences to multiply perjury and subornation of perjury; since, if no order of maintenance on a soldier can be made with effect, all the illegitimate children born in that part of the country where they are resident will be charged to them. Secondly, Whether the defendant were originally guilty of any crime or not is perfectly immaterial, because at any rate the disobeying of the first order of sessions, having competent jurisdiction to make it, was criminal in itself, and subjects the party disobeying to all the consequences of a crime. And that alone is a sufficient ground to discharge the present rule. As to the original charge; The offence of being the reputed father of a bastard child is a crime at common law; and has been so considered by the legislature in the 18 *Eliz. c. 3.* and 7 *Jac. 1. c. 4.*

1788.

The KING
against
ARCHER.

1788.

The KING
against
ARCHER.

The Court desired to hear the answer to the two first points.

Plumer, in support of the rule. The words of the act of parliament make a general exemption in favour of all soldiers *as to all process and execution whatsoever*, and therefore the exception should be introduced by the counsel in support of the order of sessions. The defendant has a right to insist on the generality of the exemption in his favour; and it is incumbent on the other side to shew that he is not entitled to the exemption, by bringing him within one or other of the exceptions. For unless they shew that the defendant has incurred a debt to the amount of 20*l.*, or that he has committed some crime, he is entitled to be discharged by the general provisions of the act. In the first place, this is a debt, but it does not amount to 20*l.* There are many cases where civil proceedings are had in a summary manner, in which no previous affidavit is made of the demand, and in which no costs are recoverable; as for instance, proceedings before a justice of the peace for non-payment of tithes. So in the case of an attachment for non-payment of costs; it is a proceeding of a civil nature; it is considered as a debt within the Lords' act, under which a debtor in custody on such an attachment may be discharged (a). And if a soldier be held liable to be arrested for not paying a weekly sum of one shilling, it cannot be reconciled to the provisions of the act, which says that he shall not be arrested for any debt, unless it amounts to 20*l.* Secondly, This defendant does not stand committed for a crime; the commitment itself shews it. Here it is necessary to assume, for the purpose of this argument, that the original charge was not a crime cognizable in the temporal courts, but is an offence merely spiritual, and punishable in the spiritual courts. If then that with which the defendant was originally charged be not of a criminal but of a civil nature, the proceeding to enforce the payment of a civil debt, in the nature of process or execution, cannot be considered in a criminal light. The original order was made under the 18 *Eliz. c. 3. s. 2.* which points out two remedies; one, the punishment of the father and mother, and for the relief of the parish; the other for the maintenance of the bastard child: now the order in the present case was for the

(a) *Cowp.* 136.

support and maintenance of the bastard child, and not by way of punishment. It is a proceeding under that part of the act which directs a civil proceeding for a civil purpose; and it is made on the complaint of the churchwardens who are likely to be injured, and who seek a satisfaction in money; and if the money had been paid, the defendant could not have been committed: but if it had been a prosecution for a crime, it must have been at the suit of the King, in which case the defendant could not have been entitled to be discharged on the payment of any sum of money. If this had been a commitment by way of punishment, it would have been for a definite time: but this is only till he pays a certain debt; which shews it to be in the nature of an execution in a civil suit. The form of the commitment cannot vary the nature of the charge. An attachment for non-payment of costs is in form criminal, but in substance it is only a civil proceeding; so this, though perhaps criminal in its form, is of a civil nature. With respect to the argument of inconvenience, it seems that greater inconvenience will ensue to the public from permitting soldiers to be imprisoned for acts of this kind, than in determining that they are not liable to be arrested for such a demand as the present. This privilege, bestowed on the military by the mutiny act, is not for the sake of the individuals, but of the public, who are materially interested in the protection of the soldiers, particularly in time of war. And the public service might be essentially impeded by the apprehension of a number of soldiers ordered on a particular expedition just before they embarked for some foreign country. And such a determination is open to this farther inconvenience, that if a soldier wished to be excused from any particular expedition, or from the service in general, he might in effect desert the service by procuring a charge of this sort to be made upon him.

ASHHURST, J.—It appears to me that the present case does not come within the provisions of the mutiny act. The first part of the sixty-third section was intended to apply merely to the cases of civil actions: for it begins with stating that “to prevent any unjust or fraudulent arrests,” &c.; that was the mischief intended to be guarded against: then it provides that no person who shall enlist, &c. shall be liable to be taken out of his majesty’s service by any process or execution whatever, other than for some criminal matter, or for a real debt amounting to 20*l*. It appears from this part of the act of parliament that the

1788.

The KING
against
ARCHER.

1788.

The KING
against
ARCHER.

the legislature had only in view the preventing of arrests in civil actions, and it has no relation to crimes or any thing of a criminal nature. So that the case of a soldier who is taken up for disobeying an order of justices does not come within this part of the statute. But I have no difficulty in saying, if it were necessary to have recourse to it, that this cause of commitment is of a criminal nature. The disobedience of an order of justices is so far criminal, that in almost every instance the party disobeying may be indicted for it; this shews it to be a crime. Therefore I am of opinion that the court of sessions have adjudged rightly, and that we cannot release the defendant from his commitment under the mutiny act.

GROSE, J.—This is so clear a case, that I think it unnecessary to add any thing to what has been already said.

Rule discharged.

Friday,
Feb. 8th.

WHITE, *Qui Tam, &c.* against BOOT.

Proceedings
in a penal
action on
25 Ed. 3. st. 4.
c. 3. stayed
on motion,
because no
affidavit had
been filed
that the of-
fence was
committed
within the
county where
the action
was brought,
or within a
year, accord-
ing to 21
Jac. 1. c. 4.

BALDWIN shewed cause against a rule to stay the proceedings in this action, which was brought on the 25 Ed. 3. st. 4. c. 3. because the plaintiff had not filed any affidavit, that the offence was committed within the county where, or within a year before, the action was brought, according to the 21 Jac. 1. c. 4. He said that the directions of this ancient statute had never been followed in practice; and even if an affidavit were necessary, the want of it was not a sufficient ground to stay the proceedings, for the statute is merely directory to the officer to receive such an affidavit. And if it be true that the offence is not laid in the proper county, or that the action is not commenced within a year after the offence committed, the defendant may avail himself of it at the trial, and the plaintiff will not be entitled to recover.

Erskine, in support of the rule, observed, that the words of the statute are plain and unequivocal; that no officer in any court of record shall receive any information, &c. grounded upon the said penal statutes, until the informer hath first taken an oath that the offence was committed in the county where it is laid, within a year before the information, &c. So that the court cannot suffer the declaration in this case to be filed until the plaintiff has complied with the directions of the statute.

In

In *Salk.* 373. It was held that the statute of *Jac.* 1. applies to all penal actions and informations that are given by statutes antecedent to the passing of that act, and that such actions and informations must be brought in the county where the offence was committed. If any practice has obtained in defiance of the statute, it is proper that the court should interfere and take care that it is enforced.

Per Curiam. An act of parliament cannot be repealed by non-user. Notwithstanding any practice that may have obtained to the contrary, as long as the statute of *James* the First remains unrepealed, we must see it carried into execution. And as the plaintiff has not complied with the directions of the statute, the proceedings must be stayed. This seems to be the proper mode of taking advantage of this objection.

Rule absolute.

WATKINS *against* TOWERS and Others.

Friday,
Feb. 8th.

THIS was an action of assumpsit. The declaration stated that on 29th *March* 1781, to wit, at *Westminster*, in the county of *Middlesex*, in consideration that the plaintiff, at the instance and request of the defendants, had agreed to become a member of *The Union Society* for insuring goods from loss by fire, and to conform to a deed of settlement made in that behalf, dated 16th *February* 1714, enrolled in chancery; and also in consideration of ten guineas paid by the plaintiff into the treasury of the said society, whereof the defendants were trustees, being the consideration for insuring 700*l.* to the plaintiff upon his goods for seven years, the defendants as such trustees undertook and promised to pay, &c. in case of a loss by fire: it then stated a loss and non-payment by the defendants. The defendants pleaded the general issue. The venue was changed by rule of court from *Middlesex* to *London*, on the application of the defendants; and that rule was afterwards discharged, on the plaintiff's undertaking to give evidence of some matter in issue, arising in the county of *Middlesex* where the cause of action was first laid; after which the defendants had paid 71*l.* into court under the usual rule. At the trial before *Buller, J.* at *Guildhall*, after last Term, the plaintiff in pursuance of his undertaking to give some evidence in *Middlesex*, proved the rule of this court by

Where a rule to change the venue in an action of assumpsit from *A.* to *B.* has been discharged upon the plaintiff's undertaking to give evidence of some matter in issue arising in *A.*, the undertaking is complied with by proving a rule of court in *A.* that the defendant shall be at liberty to pay money into court, though that rule was obtained after the discharge of the rule for changing the venue. Paying money into court is an admission of the declaration.

the contract stated in the

which

1788.

WATKINS
against
TOWERS
and Others.

which the defendant paid money into court. It was objected by the defendants' counsel that this was not a compliance with the plaintiff's undertaking, and therefore that he ought to be nonsuited: but the learned judge was of opinion that the payment of money into court was an admission of the contract on which the action was brought, and, this being proved by a rule of court in *Middlesex*, that the plaintiff had fulfilled his engagement. And a verdict was afterwards given for the plaintiff.

Erskine obtained a rule to shew cause why a nonsuit should not be entered, because, first, a party who obtains a rule to change the venue, or to bring back the venue to the county where it was originally laid, must give some evidence, which would have been evidence to support or to destroy the action at the time it was brought, and that giving evidence of matter arising *ex post facto* is not a sufficient compliance with that rule. *Santler v. Heard*. 2 Bl. Rep. 1031. Salk. 669. And that in this instance the rule for paying money into court was not obtained till after the rule for discharging the defendants' rule to change the venue; and therefore the evidence given arose after the undertaking was made. Secondly, If then the plaintiff failed in his undertaking, he ought to be nonsuited. But the Court recommended it to him to take the rule in the alternative, either for a new trial or a non-suit.

Bearcroft, Morgan, and Garrow, now shewed cause against the rule, and contended that the plaintiff had complied with his undertaking, because the payment of money into court proved the most material point in issue, namely, the contract itself, on which the action was founded. It proved the very cause of action, and reduced the question to a mere execution of a writ of enquiry. The objection that the rule of court, for discharging the defendants' rule to change the venue, was obtained before the rule to pay money into court, and therefore that proof of the latter rule was not a compliance with the terms of the plaintiff's undertaking, is not entitled to any weight, because the payment of money into court has a reference to the original contract, and prevented the necessity of the plaintiff's proving it by any other means. In *Santler v. Heard*, where the plaintiff under a similar rule with the present gave no other material evidence in *Middlesex*, than that the witnesses to prove the contract resided there, the court very properly determined that this evidence was not a compliance with the rule: but here the plaintiff

plaintiff gave evidence of that which affirmed the contract on which he sued. With respect to the case in *Salk*. where, in trover, the defendant had changed the venue, and the plaintiff, who was the assignee of a bankrupt, moved to set aside the rule, undertaking to give evidence in the county where the action was laid; on its appearing that the only proof intended to be given under the plaintiff's rule was the assignment from the commissioners of bankrupt to him, the court very properly refused to grant a rule which was unnecessary. That was an application to the discretion of the court, and no satisfactory reason was stated to induce them to grant it. But here the court exercised a discretion in granting the rule on the plaintiff's undertaking to do that which he has since complied with. Here the plaintiff proved that the cause of action arose in the county where the venue was originally laid: and even in cases where the cause of action arises in two different counties, the plaintiff has his election in which to lay the venue. But even supposing the court should be of opinion that the plaintiff has not performed his undertaking, the utmost the court can do is to direct a new trial; for it is indisputably clear, that a plaintiff cannot be nonsuited at the trial against his consent. In *Santler v. Heard*, the point was reserved at the trial: but it was not so in this case. Several instances (a) have happened in which a plaintiff has insisted on his right to appear at the trial, when the judge has been under a necessity of directing the jury to find a verdict against him. Neither can a new trial be granted in this case: the argument, on which it must be contended that a new trial should be granted, must be founded on a supposition that this cause has not been tried in the proper county: but this objection cannot be made after verdict, it being cured by 16 & 17 Car. 2. c. 8. Lord *Calverley v. Sir R. Leving*. Comb. 472. But even if this objection could prevail after verdict, a motion for a new trial has always been considered as an application to the discretion of the court; now it would be nugatory to grant a new trial in the present case, because the plaintiff could prove the cause of action in *Middlesex*, by giving evidence of the deed of settlement enrolled in chancery, or of a bill and answer filed in the exchequer in a cause between these parties.

Erskine, S. Heywood, and Gregg, in support of the rule. As to the first point; the plaintiff's undertaking to give material

(a) *Macbeath v. Haldimand*. 1 Vol. 176.

1788.

WATKINS
against
TOWERS
and Others.

1788.

WATKINS
against
TOWERS,
and Others.

evidence in *Middlesex*, on his obtaining a rule to rechange the *venue*, must be taken to apply to nothing but that which existed at the time, for he cannot be supposed to have undertaken to prove that which did not exist: now the rule for paying money into court was not obtained till afterwards; so that giving proof of that which had no existence at the time is not a compliance with his undertaking. The statutes 6 Ric. 2. c. 2. and 4 Hen. 4. c. 18. were passed to compel the suing out of all writs arising upon contract in the county where the contract arose. Soon after the latter of those statutes the practice began of pleading the matter in abatement, so that unless the matter existed at the time of pleading in abatement, the defendant could not take advantage of it; and the mode of changing the *venue* by motion and affidavit, which was substituted in lieu of the practice of pleading in abatement, after the 16 & 17 Car. 2. c. 8. must be considered with a reference to it. In *Santler v. Heard*, *Blackstone* J. observed that "as it would be hard to conclude the plaintiff by the single affidavit of the defendant, he is at liberty to aver that the cause of action arose in the county where the *venue* is laid, and to go to trial on that fact, at the same time that the merits are tried, by undertaking to give material evidence arising in that county. This is equivalent to joining issue, that the cause of action arose in the first county. And if the plaintiff fail in proving it, he must be nonsuited at the trial; which has in this case the same effect as quashing the writ by a judgment on a plea in abatement, *Gilb. Hist. C. P. c. 7.*" Now supposing in the present case that there had been a plea in abatement, that the cause of action arose in *London*, according to the ancient practice, and issue had been joined on that, the plaintiff could not have given this rule for payment of money into court in evidence, because it had no existence at the time when the plea in abatement must have been pleaded. And *Blackstone* J. observes that undertaking to give material evidence on rechanging the *venue* is equivalent to joining issue on that fact. If then according to the ancient mode of proceeding, the plaintiff in this case could not have succeeded, his giving evidence of a matter which did not exist at the time of his undertaking cannot be deemed a compliance with the rule according to the present practice. And the payment of the money into court is only an admission of the contract *pro tanto*. *Cox and Another v. Parry*, ante 1 vol. 464. With respect

respect to the second question, they admitted that in general a plaintiff could not be nonsuited against his consent, but contended that the present case was an exception to the general rule, because the plaintiff had undertaken not to appear at the trial in *Middlesex*, unless he gave evidence of some matter in issue arising there; so that this conditional undertaking operates as a consent to be nonsuited in case it was not performed. In *Santor v. Heard*, the whole court were of opinion that they had power to nonsuit the plaintiff, and three of the judges thought that they were bound to do so. And Lord Ch. J. *De Grey* observing on the case of the Duke of *Bedford v. Bray*, 2 *Barn.* 290. that the condition of nonsuit was in so many words expressed in the rule, said "The present rule implies the same:" now the undertaking in the present case is precisely similar to that in *Bruckshaw v. Hopkins* (a), where the plaintiff brought back the venue to *London*, on an undertaking like the present: Lord *Mansfield* said "If he does not give material evidence in *London* he must be nonsuited." But if the court should be of opinion that they are not bound to order a nonsuit to be entered, it will be to no purpose to grant a new trial, because unless the plaintiff complies with his undertaking he will not be entitled to a verdict. At all events as it is discretionary in the court whether they will grant a new trial or not, they may do complete justice between the parties by permitting the defendants to impeach the contract itself, notwithstanding they have paid money into court. The defendants, knowing that the plaintiff really had effects in the house which was burned to the amount of 71*l.* unguardedly paid that sum into court, though there were strong grounds of suspicion that the plaintiff had set fire to the house himself; if therefore a new trial should be granted, the court may, as the plaintiff did not fulfil his undertaking at the trial, grant it upon terms, and permit the defendants to dispute the validity of the contract.

ASHHURST, J.—The first question in this case is, whether the plaintiff has or has not complied with the terms of his undertaking; and if he has not, the next question will be, whether on a motion for a new trial, which is an application to the discretion of the court, we ought to do that which we cannot but see will ultimately prove a nugatory act. As to the first, I am clearly of opinion that he has complied with his undertaking,

(a) *Corp.* 410.

1788.

WATKINS
against
TOWERS,
and Others.

1788.

WATKINS
against
TOWERS,
and Others.

which was to give material evidence of some matter in issue arising in *Middlesex*. By the terms of this declaration it was incumbent on the plaintiff to prove that he did become a member of the *Union Society*, that he agreed to conform to the deed of settlement of 1714, of which the defendants were trustees, and that the defendants promised, &c.; these were facts material to the point in issue, and the payment of money into court was material evidence as to that point, because it admitted the cause of action, and superseded the necessity of all that proof which the plaintiff must otherwise have given. So that I think that the plaintiff has fully complied with his undertaking. But even if that could be doubted, which I think cannot, I should be of opinion that we ought not to grant a new trial in this case, because on a second trial the plaintiff could give material evidence in *Middlesex*, by proving the deed of settlement enrolled in Chancery, or the bill and answer in the court of Exchequer. Therefore on both grounds I think the rule ought to be discharged.

GROSE, J.—The principal ground of this motion is, that the plaintiff has not complied with his undertaking, which was to give material evidence of some matter in issue arising in *Middlesex*. On the face of the declaration it appears that the plaintiff, as a member of the *Union Society*, which is established by deed enrolled in *Middlesex*, was entitled to a certain sum in the event of his goods being destroyed by fire: now even supposing that the goods were burned in *London*, then there would be a cause of action arising in two different counties, in which case the defendant could not change the *venue*; because in order to change the *venue* from *B.* to *A.* the defendant must swear that the cause of action arose wholly in *A.* and not in *B.* or elsewhere out of the county of *A.* Then in order to bring back the *venue* the plaintiff undertook to give material evidence in *Middlesex*; and on the trial he gave evidence of the rule of court by which the defendant had paid money into court. But the payment of money into court is an admission of some money due to the plaintiff on the contract stated in the declaration; and the contract stated in this declaration arose on a deed in *Middlesex*. This surely then is material evidence arising within the county of *Middlesex*. And when the plaintiff was going to prove the deed, my brother *Buller* thought it not necessary, because the payment of money into court admitted the contract. This motion was not made on the ground of misdirection; and I am clearly of opinion that the determination of the learned judge at the trial was founded on

on true principles of law. It is not necessary to go into the other point, because the rule must be discharged upon the first ground: If it were, I should think that we could not order a nonsuit to be entered against the consent of the plaintiff, but we might have granted a new trial on terms.

Rule discharged.

1788.

WATKINS
against
TOWERS,
and Others.

JACKSON, against WILLIAMSON Bart. and Others.

Monday,
Feb. 11th.

A RULE had been obtained by *Lambe*, to shew cause why the *Postea* in this cause should not be amended, by inserting the sum of 61*l.* instead of 30*l.* agreeable to the real finding of the jury. It was an action of trespass against the sheriff of *Durham* for having unjustly sold a coal keel or lighter. It was proved at the trial that the sheriff had actually sold this for 31*l.* but several of the witnesses on the part of the plaintiff proved it to have been worth 60*l.* the jury gave their verdict for 30*l. damages*, and now the plaintiff produced an affidavit made by all the jurymen, saying that they meant to give the 30*l.* as damages for the seizing and detaining the vessel, over and above the 31*l.* for which it appeared that the vessel had been actually sold; and that they conceived that the prothonotary would of course add the 30*l.* to the 31*l.*, and thereby make the whole sum of 61*l.* which the jury intended to give.

Chambre shewed caused, and contended that it would be a very dangerous practice, if the court were to give way to such an application in any instance. If there is any ambiguity in a verdict, it ought to be inquired into and explained at the time. The verdict in this case was conceived in very plain terms; and though perhaps the jury ought to have given the 31*l.* yet the difference is too trifling to be attended to.

Law and *Lambe contra*, said it was entirely owing to the accident of the plaintiff's counsel happening to be out of court, when the verdict was delivered, that the mistake was not corrected at the time; but it was so the very first opportunity afterwards. Here the mistake spoke for itself. It was impossible the jury could intend to give less than what it appeared the sheriff had actually received into his hands by the sale. The seizure of the vessel, which was without any colour, had been a great detriment to the plaintiff, who would not only be put to a considerable expence in procuring another, but had lost the intermediate profits: and as the jury had *unanimously* concurred in the

The court will not at a distance of time after the trial amend the *postea* by encreasing the damages given by the jury, altho' all the jurymen join in an affidavit stating their intention to have been to give the plaintiff such encreased sum, and that they conceived that the verdict they had given was calculated to give him such sum.

1788.

JACKSON
against
WILLIAM-
SON
and Others.

the explanation of their verdict, he conceived that no inconveniences need be apprehended from acceding to it in such a case as this.

The Court refused the application, saying that it would introduce a very dangerous practice if they were to admit such an affidavit as the one offered. They said that they laid no stress upon its being made by all the jury: if it could be made by all, upon the same principle it might as well be made by some. If any doubt had arisen as to the meaning of the jury, if they had found a sum inadequate to the value proved, the proper time for requiring an explanation was at the trial. It was too late now: such a practice would be productive of infinite mischief: and it was better that the present plaintiff should suffer an inconvenience than that such a rule should be introduced.

Rule discharged,

Monday,
Feb. 11th.

GRAHAM and Others against ROBERTSON.

Plaintiffs together with A. and B. being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded, with costs, which was paid solely by the plaintiffs, A. and B.

THE plaintiffs brought this action, at the Sittings after last Term at *Guildhall*, for money paid to the use of the defendant under these circumstances:—The *Trimmer* privateer, of which these plaintiffs and two other persons of the name of *Grant* were joint owners, during the course of the last war took two prizes in conjunction with the *Maidstone*, another privateer, of which the defendant was owner, and which were condemned in the Vice Admiralty Court of *Minorca*. In consequence of an agreement between the plaintiffs and defendant to share all prizes, half of the money arising from the sale was paid to the defendant's agent. Afterwards, on appeal to the King in council, the sentence of condemnation was reversed, and the money decreed to be refunded to the appellants, with costs, which was paid by the present plaintiffs alone, the other partners having in the mean time become bankrupts (a). The sentence of restitution was awarded previous to the bankruptcy; but the report of the registrar, ascertaining the amount of the restitution, was not

having in the mean time become bankrupts. An action cannot be brought by the plaintiffs alone for a moiety of the restitution money and of the costs, because it was either a partnership transaction, when A. and B. ought to be joined; or not, when separate actions should be brought by each of the persons paying.

(a) In the Admiralty court only the names of the owners of the *Trimmer* privateer appeared; and consequently, after final sentence

of restitution was awarded, the attachment issued against them only.

made, and the final decree, confirming the interlocutory decree of restitution, did not take place, till after. This action was brought to recover a moiety of the sum paid by the plaintiffs.

Buller, J. before whom the cause was tried, was of opinion, upon the objection being taken for want of proper parties, that the plaintiffs, having paid the money on account of a partnership transaction, must be nonsuited, because the other partners or their assignees were not joined; and directed it accordingly. A rule was obtained on a former day in this term to shew cause why the nonsuit should not be set aside, upon the ground that those other partners having become bankrupts before the payment of the money, and consequently before the cause of action arose, and not having contributed any thing towards the payment of that sum, and therefore not being in any degree damaged, there was no occasion to join their names or those of their assignees in this action.

Bower and *Baldwin* shewed cause by observing shortly, that all the persons, as well the *Grants* as the present plaintiffs, were owners at the time the capture was made of the vessels in question, and continued joint owners when the expences were incurred for which this action was brought. It was a partnership transaction; and the defendant was as much responsible to those other partners as to these plaintiffs. Their having become bankrupts could not preclude their right of action; and therefore their assignees, who now stand in their place, ought to have been joined. No argument could make the case clearer than the bare statement of the facts.

Bearcroft, *Erskine*, and *Park*, admitted the force of the defendant's objection, if the action had been brought merely to recover prize money which had been paid into the hands of the defendant; but contended that it did not hold in this action, which was brought to recover money which had been paid by these plaintiffs *alone* for the use of the defendant, because they are the only persons who have been in anywise damaged by having expended so much money out of their own pockets. To what purpose then should the assignees of the bankrupts be made co-plaintiffs, when their estate has not been injured at all by the payment of any money? The only principle, as appears from *Bro. Abr. tit. Joinder in Action*, for joining plaintiffs in an action, is because they have a joint claim; but the bankrupts have no claim on any part of the sum which it is the object of

1788.

GRAHAM
and Others
against
ROBERTSON.

1788.

GRAHAM
and Others
against
ROBERTSON.

the present action to recover; and if they had been joined with the present plaintiffs, neither they nor their assignees would have been entitled to retain any part of the sum recovered. When this case was before the Chancellor last year, and the present plaintiffs petitioned his Lordship to permit them to prove the bankrupts' proportion of the loss upon the restitution under their commission, his Lordship refused the application, saying that the determination of the Privy Council was only in the nature of an interlocutory judgment; and said that he would not permit the plaintiffs to prove their demand, unless it could be shewn that upon an interlocutory judgment previous to a bankruptcy, and an assessment of damages afterwards, the creditor had been allowed to prove such debt. So that if the assignees are entitled to any share of the money to be recovered from the defendant, these plaintiffs, who are the only persons damnified, will be left without any redress whatever as to such proportion.

ASHHURST, J.—I am of opinion that this nonsuit is right. There is one decisive answer to all that has been said on the part of the plaintiffs. Either this money was paid by them on the partnership account, or not; if it were, then the other partners who are become bankrupts, or their assignees, should have been joined. If it were not paid on a partnership account, then it stands as a separate payment by each individual of the plaintiffs; and then the sum demanded must be recovered by each in a separate action, they not being partners *quoad* this transaction. So that in either case the action is wrongly conceived.

GROSE, J.—I entertained some doubt at first; but I am now clearly of opinion, for the reasons given by my brother *Ashhurst*, that this action is improperly brought; and I am further confirmed in this idea from what fell from the plaintiffs' counsel relative to the plaintiffs petitioning the Chancellor to be admitted to prove the proportion under the commission, for this is a clear acknowledgment by them that the payment in question was made on the partnership account. And therefore the action must be brought in the name of all the partners. But if that were not so, then each individual must bring a separate action for what he actually advanced. Therefore *quacunque viâ datâ* the nonsuit was right.

Rule discharged.

The

The KING *against* EATON*.

Wednesday,
Nov. 28th,
1787.

BALDWIN had moved to quash a return of a justice of peace to remove a conviction on the Deer Act (a); which return was that the defendant, after the conviction, having entered into a recognizance to try his appeal at the next quarter sessions, he the justice had returned the record of the conviction to the sessions, where it was filed of record, but he had annexed a copy to the writ. It was contended that the original ought to have been returned.

Per Curiam. This return is sufficient; for upon the defendant's entering into a recognizance to try the appeal, it was the duty of the justice to return the original record of the conviction to the sessions: and besides, a *certiorari* in this instance was improper, the party having appealed to the sessions, and thereby made his election according to the terms of the act. And indeed where an act gives a general form of conviction, as in this instance, the party can have no benefit from a *certiorari*, because the proceedings or examinations need not be returned, but the conviction only, which, being general, cannot exhibit the error on the proceedings. And

BULLER, J. added—That a justice of peace ought in every instance to return a conviction by him to the sessions, whether the party appeals or not, or whether an appeal is or is not given, that the Crown may not be deprived of its share of forfeitures.

Rule discharged.

(a) 16 Geo. 3. c. 30.

* This case was omitted by accident in the Reports of last *Michaelmas* Term, to which it properly belongs.

Lord **MANSFIELD** was not able to attend the whole of this Term.

The END of HILARY TERM.

Upon a *certiorari* to remove a conviction by a justice of peace on the Deer Act (16 Geo. 3. c. 30) a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient. Justices ought in all cases to return convictions to the sessions, whether an appeal lies or not.

The King's Speech
The King's Speech was delivered in the House of Commons on the 22nd of January 1763. It was a short and simple speech, in which the King expressed his satisfaction with the state of the kingdom, and his confidence in the wisdom and loyalty of his ministers. He also mentioned the success of the war against the Americans, and the peace which had been concluded. The speech was well received by the House, and the King's words were met with applause.

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C A S E S

1788.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Twenty-Eighth Year of the Reign of GEORGE III.

VERNON and Others, Assignees of ELIZABETH TYLER,
a Bankrupt, against HANSON.

Saturday,
April 12th.

ASSUMPSIT for money had and received. Plea the
general issue.

At the trial of this cause before *Buller, J.* at the Sittings after last term at *Guildhall*, the plaintiff was nonsuited. On a motion for a rule to shew cause why the non-suit should not be set aside, and a new trial granted, the facts appeared to be these; the defendant had received 1000*l.*, being the amount of a draught drawn in his favor for a *bonâ fide* debt by the bankrupt on Messrs. *Hankeys*, her bankers, which money was received by the defendant after notice of the bankruptcy. At the Sittings after last *Trinity* term the plaintiffs had recovered a large sum against the *Hankeys* for money belonging to the bankrupt received by them, in which action they attempted to set off this as well as several other sums which they had paid on the bankrupt's account: but, it appearing that they had paid those sums with full knowledge of the bankruptcy, the set-off was disallowed (a).

When the assignees of a bankrupt have recovered a sum of money from the bankrupt's banker, received by him and paid over to a creditor of the bankrupt with knowledge of the bankruptcy, they cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy.

Erskine, Piggott, and Gibbs, in support of the motion, contended, first, that inasmuch as the defendant had received the money of the bankrupt with knowledge of the bankruptcy, he

(a) *Vide Vernon v. Hankey, ante 113.*

1788.

VERNON
and Others
against
HANSON.

was not entitled to retain it. And, secondly, that no one could recover it back but the assignees. As to the first, it could not be contended but that the defendant would have been liable if the assignees had originally brought the action against him: but it was said at the trial that they had recovered this sum in the action against the *Hankeys*, and therefore they could not recover it in this against the defendant. But in the first place the assignees have not yet received that sum, the defendants in the first action having filed a bill in Chancery praying to be relieved from the effects of the judgment; so that though they have obtained judgment, they have not yet taken out execution. Besides, the sum which they recovered in that action was money received by the *Hankeys* on the bankrupt's account, and not money which they had paid after notice of the bankruptcy. And it cannot be material to the defendant in this action to consider what sums the plaintiffs have recovered against the *Hankeys*, if it appear that the defendant has money in his hands belonging to the bankrupt, which he received after notice of the bankruptcy. And the defendant's having been paid by a draught drawn by the bankrupt in his favor, it is the same as if the money had been actually paid by her to him. Secondly, no one but the plaintiffs can maintain this action to recover from the defendant that sum which he is not entitled to retain. It would be an answer to an action brought by the *Hankeys*, to say that they had paid this sum not on their own account, but on the bankrupt's. Suppose the *Hankeys*, instead of being debtors, had been creditors, of the bankrupt, and had advanced this sum of money to the defendant on the credit of the bankrupt, the defendant having notice of the bankruptcy; there could be no doubt but that the assignees could have recovered that sum from the defendant: then the circumstance of the *Hankeys* being debtors to the estate of the bankrupt, and having been compelled by an action brought by the assignees to pay over that sum to the amount of which they were the bankrupt's debtors, cannot vary the question in this action as against the present defendant, because they answered the bankrupt's draught out of the effects of the assignees, knowing of the bankruptcy. And it is to be observed that both these actions disaffirm the payment made by the *Hankeys*: it might perhaps have been different if the plaintiffs had affirmed the payment in one action, and attempted to disaffirm it in the other.

The Court were of opinion that the counsel for the plaintiffs had not laid a sufficient ground before them to induce them to grant a rule to shew cause ; and

ASHHURST, J. said, it is admitted very properly that the plaintiffs cannot affirm and dis-affirm the same transaction : then try this question by that test. This was no specific money of the bankrupt paid to the defendant ; it was only a payment in the common course of business by her bankers, who had, prior to that, received large sums of money belonging to the bankrupt. The plaintiffs first brought an action against the bankers for all the money received by them on the bankrupt's account, against which demand they offered to set off this as well as several other sums which they had paid on account of the bankrupt ; to this the assignees objected, insisting that those payments were made with their own money, and not with that of the bankrupt. But in the present action they say it was a payment with the money of the bankrupt ; and, the defendant having received it with knowledge of the bankruptcy, they insist that they have a right to recover it back. It has not been attempted to be disputed but that the defendant was a *bona fide* creditor of the bankrupt ; and a payment by her to him, although with notice of the bankruptcy, would have been good as against all persons but the general creditors. If therefore he does no injury to the creditors, he does not hold it against conscience. The bankrupt's estate has not been injured at all by this payment ; for the assignees have already received this sum from the *Hankeys* ; then they say that they have a right to bring this action against the defendant, because otherwise the *Hankeys* cannot recover it back. But the *Hankeys* paid this sum knowing of the bankruptcy, and perhaps have no right to recover it back. But that is immaterial as far as it respects the assignees ; they are now interposing between two creditors in a case in which the general body of creditors have no concern.

BULLER, J.—The only question now before the court is whether this action against the present defendant can be supported. I am clearly of opinion that it cannot. At first the plaintiffs had an election whether they would bring this action against the *Hankeys* or this defendant. Supposing no action had been brought against the *Hankeys*, this action might have been maintained on the ground that the payment by the *Hankeys* was

r788.

VERNON
and Others
against
HANSON.

1788.

VERNON
and Others
against
HANSON.

a payment by their agent, whose acts they would then have adopted. But in the former action, which was brought against the *Hankeys*, they insisted that it was no payment on their account, and that it was void. They cannot therefore now be permitted to say that the payment was made on their account.

GROSE, J.—This action is brought on the ground that the defendant has received money from the *Hankeys* belonging to the assignees. But when the plaintiffs brought the former action, they denied that the payment had been made by the *Hankeys* on their account; and they shall not now be permitted to contradict it.

Rule refused.

Monday,
April 14th.

The KING against The Bishop of ELY.

THIS was a rule calling on the Bishop of *Ely* to shew cause why a *mandamus* should not issue, directed to him, commanding him to appoint one of the two persons, namely, the Reverend *George Borlase* and the Reverend *Francis Barnes*, elected, nominated, and presented to him by the Fellows of *Peterhouse College, Cambridge*, to be master of the said college. It was agreed by the counsel on both sides that the bishop and the prosecutor should acquiesce in the opinion of the court on the argument of the rule to shew cause.

It appeared from the affidavits filed on both sides, and from the statutes and extracts from the college register annexed thereto, that the college was founded in 1284, by *Hugh de Balsbam*, Bishop of *Ely*, by a charter of foundation, recited and confirmed by a charter of king *Edward 1st.* in the thirteenth year of his reign; that the founder directed the persons to be maintained on the foundation to be for ever stiled The Scholars of the Bishops of *Ely*, which is the name of the society inscribed round the common seal of the college at this day. That *Simon de Montacute*, the Seventh Bishop in succession from the founder, gave a code of statutes about the year 1344, by which and other statutes given by his successors in the see, as revised and altered by the commissioners for visiting the university of *Cambridge* in the reign of *Edward VIth.* the college had ever since been

been governed (a). It further appeared that the number of persons on the foundation, being the number mentioned in the (b) statutes, consisted of a master and fourteen fellows, sometimes called perpetual scholars, eight poor scholars, and two bibliotists. That there had been other fellowships and scholarships annexed at different times and by different benefactors, but these had never been considered as conferring on those who held them any privileges (c) as members of the society. It further appeared that the mastership of the college becoming vacant on the 14th of *August* 1787, by the death of Doctor *Law*, bishop of *Carlisle*, the senior fellow of the college, the day after such vacancy was notified to him, caused a schedule to be affixed for twelve days together upon the most public door of the college hall, appointing 31st of *September* next for the election of a new master. On the day appointed for the election, the Reverend *George Borlase*, B. D. and fellow of the college, the Reverend *Daniel Longmire*, B. D. who had been a fellow of the college, and had vacated his fellowship by the acceptance of a college living in the year 1776, but who had continued to keep his name inrolled on the boards of the college, and the Reverend *Francis Barnes*, B. D. and vice-provost of *King's College Cambridge*, who had never been a member of *Peterhouse*, offered themselves candidates for the mastership. [For the qualifications of the candidates, method of election, and return to be made to the bishop of *Ely* of two persons in order to his appointing one of them to be master of the college, see the statutes.] It further appeared that at the time of the election there were twelve instituted fellows upon the foundation, and two who were in their year of probation, and consequently not entitled to vote. That on the day appointed for the

1788.

The KING
against
The Bishop
of ELY.

(a) Two persons swore that they believed the founder gave several statutes for the regulation of his college; but none such were produced on either side, neither had any been known to exist for several hundred years. Indeed it should seem from the preamble to *Simon de Montacute's* Statutes, (*quod vide*) that none had ever been given by the founder, or at most very imperfect ones; which is probable, as he died within two years after the endowment in 1286, in which year, according to the register of

Ely, *John de Kirkeby* was consecrated bishop of the see.

(b) There are provisions in *Simon de Montacute's* code (vid. stat. de numero scholarium) for encreasing the number of scholars on the old foundation, if the revenues thereof would at any time admit of the augmentation; which was to be made with the consent of the bishop of *Ely* for the time being. But no such encrease had ever taken place, except in one instance several years ago.

(c) Probably on account of some clauses in the respective indentures of annexation.

1788.

The KING
against
The Bishop
of Ely.

election, eleven of the instituted fellows assembled in the chapel and proceeded to the election according to the forms prescribed by the statutes, all of whom nominated the said *George Borlase*; eight of them nominated *Francis Barnes*, and three of them nominated the said *Daniel Longmire*. That neither the senior fellow of the college nor Mr. *Longmire* were informed or knew that the said *Francis Barnes* was to be a candidate, previous to the day on which the election came on. It further appeared that the said senior fellow, upon the majority of votes being declared to be in favor of the said *George Borlase* and *Francis Barnes*, did pronounce them to be nominated and elected by the fellows of the college to be presented to the bishop of *Ely*; that accordingly, on the same day letters under the common seal of the college were made out in testimony of the election, nominating and presenting the said *George Borlase* and *Francis Barnes* to the bishop of *Ely*, requiring him to appoint one of them to be master of the college, and do that which to his office therein did belong; and that the said letters were delivered to the bishop of *Ely* on the 3d of *September* by two of the fellows of the college. That the said two fellows at that time requested the bishop to make an immediate appointment, informing him that they came prepared with every necessary instrument for the purpose. And that the two persons elected were at hand, and that the preference of the society was in favor of the said *George Borlase*. That the bishop was thereupon induced to make some enquiries touching the election, and why a person from another college had been elected and returned to him, and whether there was any other person of the college qualified besides the said *George Borlase*, and was informed by one of the fellows aforesaid that there was no other fellow qualified, except the said *George Borlase*, among themselves; and that they had obeyed the statutes. That the bishop, conceiving that he could not properly discharge his duty as visitor of the college without maturely considering the statutes thereof, declined at that time to appoint either of the two persons so nominated to him. It further appeared that on the 8th of *September* following, (five days after the return was presented to the bishop) Mr. *Longmire* and also *Francis Dawes*, the senior fellow of the college, represented in writing to the bishop that Mr. *Longmire* was a candidate at the late election; that he had three votes in his favor; that he was qualified according to the statutes for the

the mastership, had never ceased to be a member of the college, although his fellowship had been vacated by the acceptance of a college living, and that he did conceive himself fully within the meaning of the preference given by the statutes to persons of the said college or house over strangers, to the intent that the bishop of *Ely*, as visitor of the college, might take cognizance of Mr. *Longmire's* case, and of the right he supposed himself to have to be nominated by the college in preference to Mr. *Barnes*. It further appeared from the affidavit of the bishop of *Ely* that, on maturely considering the statutes of the college, *he conceived Mr. Longmire entitled to such preference claimed by him; that the return of Borlase and Barnes not being in his judgment made agreeably to the statutes of the college, he declared, as he conceived he had a right to do, the same to be null and void, and by virtue of the authority given to him by the statutes of the college, and as visitor thereof, on the 9th of October following he appointed Mr. Longmire to be master of the college by an instrument under his hand and episcopal seal; and that he conceived the right of expounding and construing the statutes of the college to belong wholly to him as visitor thereof.* That in construing them in the manner he did with respect to annulling the return and the appointment of *Longmire*, *he had fulfilled the intention of the founder of the college, and faithfully discharged his duty as visitor thereof.* The bishop of *Ely* sent his mandate dated October 9th 1788 under his episcopal seal to the college, thereby commanding Mr. *Dawes*, the senior fellow, and all the other fellows, to admit and induct Mr. *Longmire* into the mastership; in obedience to which mandate Mr. *Dawes* did, on the following day, in due form and manner, admit Mr. *Longmire* into the real and actual possession of the mastership, having first administered to him the proper oaths in the college hall.

The bishop of *Ely*, previous to his appointment of Mr. *Longmire* to the mastership, namely, on the 27th of September 1787, sent a letter to the fellows of the college, in which he subscribed himself their *Friend and Visitor*, and in which he said, *inter alia*, "On the strictest investigation of the sense of your statutes, and the most candid reference of your conduct on that occasion to the directions prescribed by them, I find it indisputably to stand in express contradiction to them. You have gone out of your own society in search of a person qualified to be your president, and have actually returned him to your visitor as

1788.

The KING
against
The Bishop
of ELY.

1788.

The King
against
The Bishop
of Ely.

“ such, notwithstanding the positive directions of *your statutes*,
 “ *that the members of your college should have the preference to*
 “ *all other candidates, and whilst at the same time you knew there*
 “ *were such who offered themselves.* For these reasons, and on
 “ this ground, it is my duty to declare your method of conducting
 “ the election for your vacant mastership unstatutable, and your
 “ *return of the persons so elected null and void; and as I am en-*
 “ *titled by this irregular and unstatutable election, which in its*
 “ *effect is a nullity by your not having within the time limited*
 “ *agreed upon the return of two qualified persons,* I do in this
 “ manner inform you, that I shall with all convenient dispatch,
 “ and the fullest attention to your credit and interest, proceed
 “ to exercise this devolved authority for this turn, by the appoint-
 “ ment of the Reverend Mr. Longmire, B. D. to be your master,
 “ who was educated in it, and formerly fellow of it, and who
 “ offered himself a candidate on the election, and by having continu-
 “ ed his name in the books is yet a member of your house.” On the
 3d of October, Mr. Borlase and two other fellows, in a let-
 ter to the bishop, expressed a concern that an act of the
 society resulting from a conscientious regard to the statutes,
 and agreeable to the statutes of the college on former occasions,
 should be adjudged by the bishop repugnant to their duty, and
 requiring to be annulled by his lordship’s visitatorial power. And
 on the same day those three fellows formally protested against the
 bishop’s appointing Mr. Longmire, such appointment being in
 their judgment contrary to the statutes of the college, and con-
 trary to the sense and practice both of the college and of the
 visitors thereof in former elections.

It also appeared that Mr. Longmire was admitted and inrolled
 on the *matricula* or roll of the college near forty years ago; and
 that such persons, who were so admitted and inrolled on the *ma-*
tricula of any college, were in the common and accepted
 language of the University, and of the statutes of the same, said
 to be of *such college*, and considered as belonging thereto.
 That soon after Mr. Longmire’s admission he was appointed a
 bibliotist on the old foundation; that in 1749 he took his de-
 gree of bachelor of arts, whereupon he ceased to be a bibliotist,
 and to receive the emoluments of that place. That it was
 the custom of the college, when any of the poor scholars or
 bibliotists took the degree of bachelor of arts, to admit others
 in their room; and that such bachelors of arts as thought they
 might

might be deemed fit for fellowships kept their names upon the boards, and they were always considered as being entitled under the statutes of the college to the same privileges in respect of their being elected fellows, as those who were in the actual possession of scholarships at the time such fellowships were to be filled up; whereas those bachelors in arts, who had taken their names from off the boards, were always considered as having resigned all pretensions to any fellowships. That Mr. *Longmire* was in 1751 admitted into a fellowship of the college. That upon his accepting a college living of the annual value of about 200 *l.* in 1775, he vacated his fellowship the following year, when his name was taken from the board on which the names of the fellows are written, and placed upon that on which the names of the fellow commoners, and other persons independent of the foundation, stand; on which board it continued inscribed till the time of election. That the usage of the college was for one of the scholars to be appointed, among other things, to write the names of the members of the college on two boards, and when these names were written over afresh, which was usually done once a-year, the name of the person whose fellowship became vacant was, of course, without any order for the purpose, removed to another part of the board, by which means the names of all the fellows stood together. All persons who keep their names upon the boards contribute to the salaries of the principal officers of the college, and to several of the common expences thereof. Whenever a person vacates a fellowship in any college in the university, he is allowed, as a matter of course, to continue his name on the boards; and it is also usual to allow persons whose names have been entered on the boards of any college to transfer their names to the boards of any other college. That it is a custom in the university of *Cambridge*, to admit no one to vote in the university senate, unless such person shall be of the degree of master of arts, or other superior degree therein, and also unless the name of such person shall appear to be entered upon the boards of some college or hall in the university, or he be one of those called *Commorantes in Villâ*. That since Mr. *Longmire* ceased to be a fellow of *Peterhouse*, he has always exercised such right of voting, which he could not have enjoyed if he had at any time ceased to be a member of or to belong to the said college, not being one of the *Commorantes in Villâ*, nor ever having entered his name on the boards of any other

1788.

The KING
against
The Bishop
of ELY.

1788.

The KING
against
The Bishop
of ELY.

other college. It further appeared that Mr. Longmire had principally resided upon his living since he had been in possession thereof.

The following statutes were annexed to the affidavits in support of the rule;

Simon, permissione divinâ *Eliensis* episcopus, dilectis filiis, magistro, et scholaribus domus nostræ Sancti Petri, Cantabrigiæ, salutem, cum benedictione et gratiâ *Jesu Christi*. Pastoralis officii debitum exigit, suadet pietas, et deposcit ratio naturalis, ut piæ prædecessorum voluntates, et ordinationes canonicæ felicè inchoatæ principio, et nequaquam perfectæ, quibus animarum saluti consulitur, et publica procuratur utilitas, pauperumque scholarium in literarum scientiâ proficere volentium subvenitur, indigentia sine debito (recto juris tramite) concludantur ad *Christi* laudem nominis et honorem. Cum itaque recolendæ memoriæ dominus *Hugo de Balsbam*, prædecessor noster, dudum *Eliensis* episcopus, pio ductus affectu et *Spiritus Sancti* gratiâ, sicut nostra tenet fiducia, illustratus, animæ suæ saluti cupiens, dum in hac valle lachrymarum viveret, ac pauperibus in literarum scientiâ proficere volentibus de congruæ sustentationis presidio, pro viribus salubriter providere, quandam domum sive collegium (a) pro bono publico in universitate nostrâ Cantabrigiæ, de consensu domini *Edvardi*, Dei gratiâ, tunc regis Angliæ, ac dilectorum filiorum prioris et capituli nostræ ecclesiæ cathedralis, concurrentibus omnibus quæ in hac parte requirebantur de jure, de novo construxit; quam vel quod, domum Sancti Petri, seu collegium scholarium episcopi *Eliensis*, Cantabrigiæ, voluit nuncupari, et eam dotavit, et in aliquibus ordinavit, prout tunc potuit, sed non sicut proposuit et voluit, (ut accepimus) si suo non obstitisset proposito fors humana, in qua, unum magistrum esse voluit, et tot scholares, quot de bonis ipsius domus poterunt, prout jura suadent, congrue sustentari. Et cum consideratis et attentis postea ejusdem domus facultatibus, compertum esset et sit quod facultates ejusdem domus vix sufficerent, et adhuc sufficiant, duntaxat pro sustentatione etiam multum tenui quindecim personarum, ejusdem prædecessoris nostri voluntas extitit, et est nostra, quod una earundem personarum magister esset perpetuus, et sit domus nostræ prædictæ, et ceteræ quatuordecim personæ scholares essent perpetui et

(a) It is to be observed that the word *aula* is used in the old statutes of the college instead of *collegium*.

studiosi,

studiosi, insistentes studio literarum: quodque status domus, ac magister et scholares hujusmodi ordinarentur, quatenus posset commode. Nos igitur *Simon*, episcopus supradictus, piis prædecessoris nostri prædicti vestigiis inhærentes, et ad præmissa debitæ considerationis oculos erigentes, collegium supradictum utpote licitum et honestum, et a jure probatum, concurrentibus omnibus quæ in hac parte requirantur de jure, ex certâ scientiâ approbamus, et tenore præsentium confirmamus, et ad petitionem eorundem magistri et scholarium se et domum eandem in formâ subscriptâ submittentium, ad ordinationem eorundem, invocatâ *Spiritus Sancti* gratiâ, procedimus, prout inferius annotatur (a).

1788.

The King
against
The Bishop
of Ely.

De Præflectione et Qualitate Magistri (b).

Statuimus, ordinamus, et etiam definimus, ut dictæ domus sive collegii nostri, et ejusdem scholarium sive sociorum, discipulorum, omniumq; ministrorum, quocunq; appellantur nomine, sit unus gubernator, qui magister seu custos domus *Cantabrigiæ* nuncupetur; vir providus et discretus, sacræ theologiæ doctor, aut ad minimum in eâdem facultate baccalaureus, in spiritualibus et temporalibus circumspectus, atque morum honestate præclarus; qui quidem ad hunc modum infra descriptum ipsius magistri qui nunc est, vel eorum qui postea futuri sunt, ibidem officio per cessionem, vel mortem, seu alio quovis modo legitimo deinceps vacante, eligatur et designetur. *In cujus vero electione, hoc imprimis observari volumus, ut ipsius domus atque sociorum ejusdem semper ratio habeatur; ut hi, si qui inter eos ad hoc munus obeundum inveniantur idonei, cæteris præferantur: sin hujusmodi in domo nulli extiterint, tum aliundè assumantur.* Deinde, ut etiam pro magistri officio simul domino *Eliensi* episcopo præsentandi eligantur, quorum unus sit ex boreali, alter ex australi, parte *Angliæ*, ita nimirum divisæ, et in suos comitatus distributæ, ut antiqua domus statuta præscripserint.

(a) The following words were inserted in the preamble to the old statutes; "secundum quod magister et scholares aulæ scholarium de *Merton*, *Oxon.* discretius ordinantur."

(b) This statute is not one of *Simon de Montacute's*, but appears to have been given by the

commissioners for visiting the university of *Cambridge* in the reign of *Edward the Sixth*. This statute as well as the next, *De electione magistri*, (which was given at the same time) are in some measure founded upon the old statute *De nominatione magistri*, which was one of *Simon de Montacute's*. Vide post.

1788.

The KING
against
The Bishop
of ELY.

De Electione Magistri.

Statuimus et volumus ut quoties hic magistratus vacaverit, tum proximo die posteaquam ea res inciderit, senior scholaris omnibus scholaribus qui domi fuerint convocatis rem aperiat; sed et schedulam, quæ diem et horam electionis novi magistri contineat, publicitus ostio aulæ magis frequentato affigi curet per duodecim dies continuos, quo dierum spatio volumus expectari cæterorum sociorum, si qui tunc abfuerint, accessum; neque enim aliter eos oportebit admoneri, five de vacatione five de electione futurâ. Transacto igitur die duodecimo, mane circiter horam octavam die electionis socii simul *et discipuli cuncti* congregentur in ecclesiâ, illicque, precibus solemniter et devote celebratis, statutum superius de præfectione et qualitate magistri publice legatur, deinde *cæteris omnibus, præter ipsos socios, exclusis*, senior ipse, primum inspectis et tactis sacro-sanctis Dei evangeliiis, juramentum his verbis conceptum præstabit; “Ego N. N. “Deum testor et hæc sancta Dei evangelia me in electione magistri jam celebrandâ, tenorem hujus statuti nuper lecti fideliter et sincere servaturum, et illos tantum pro magistro futuro nominaturum et præsentaturum, quos hoc statutum significare et describere mea conscientia judicabit, omni illegitimo affectu timoreq; et odio posthabitis.” Quod juramentum et cæteri omnes præstabunt, alter post alterum, ordine quisque suo, et eandem juramenti formam, quoties electionem ipsam aggrediantur, a singulo quoque socio præstari volumus. Postquam hujusmodi juramentum ab unoquoque sociorum præstitum fuerit, volumus, et statuimus, ut ipse senior scholaris et duo sibi ordine proximi tum in academiâ præsentés scrutinio præsent, et tam suum quam eligendorum nomina ipsi primum in singulis schedulis scribant, quas, cæteris videntibus sociis, seorsim super mensam seponant, deinde cæteri per ordinem singuli socii suum et eligendorum nomina similiter in schedulis scribant, easque tribus illis sociis tradunt; quod si tunc per viam *Spiritus Sancti* omnes concordibus animis in duos aliquos hujusmodi viros consenserint, quales in statuto ante lecto descripti sunt, aut si major pars eorundem super aliquibus hujusmodi consenserint, volumus, ut lectis primum per juniorem in scrutinio publice singulorum suffragiis, per socium maxime seniore ad magistratum electi pronuncientur. Quo demum factò, volumus item, ac statuimus,

ut eisdem duos, absque ullâ juris solemnitate, aut longiori expectatione, domino *Eliensi* episcopo, qui pro tempore fuerit, dictæ domus patrôno, sede plenâ, vel ea vacante, custodi spiritualitatis episcopatus *Eliensis*, nominent et præsentent, suis litteris sigillo communi domus in testimonium sigillatis, *quibus intra scriptis adhiberi volumus plenam fidem*: episcopusque *Eliensis*, sede plenâ, vel, eâ vacante, custos spiritualitatis prædictus, unum de duobus hisce nominatis et præsentatis, quem magis utilem intellexerit, dictis domui et scholaribus præficiat absque morâ in magistrum, ne domui et scholaribus dispendium aliquod inferat longa mora. Qui sic præfectus eisdem domui et scholaribus in eâdem domo commorantibus ejusdem domus æconimis, et ballivis, ac omnibus ministris aliis quocunque nomine censeantur, quoad exteriorem et interioram administrationem seu regimen deputatis, præmineat atque præsit: omnesque tam scholares quam ministri alii dictæ domus intra et extra ipsi magistro tanquam superiori domus in licitis et honestis obediant et intendant. Et ut libentius et devotius hæc facient, dictus *Elien.* episcopus, qui pro tempore fuerit, vel alius qui magistrum præfecerit, ut est dictum, prædictis scholaribus, æconimis, ballivis, et ministris aliis dictæ domus, suis injungant literis patentibus sigillatis, quod dicto magistro in licitis et canonicis obediant, [ut præmittitur] et intendant. *Proviso quod si omnes socii, vel major pars eorundem, in primo scrutinio non consenserint, tunc iterum, ac tertio, ad simile scrutinium accedant, donec duo, modo prædicto, ad magistri officium electi fuerint; quod si in tertio scrutinio, quod omnino intra triduum a primo die electionis haberi volumus, non consenserint, tunc illum in magistrum volumus præfici quem episcopus Eliensis, sede plenâ, vel, eâ vacante, spiritualitatis custos duxerit idoneum.*

1788.

The King
against
The Bishop
of Ely.

De Scholaribus post Admissionem eorum promotis.

Statuimus, et etiam ordinamus, quod si quis scholaris dictæ domus, postquam locum habuerit in eadem, beneficium ecclesiasticum, curam habens animarum, admiserit, vel etiam sine curâ, cujus proventus secundum verum ipsorum valorem ad centum solidos se extendant, et ipsorum beneficiorum possessionem pacificam institutionis seu collationis, vel alio mansivo titulo fuerit affecutus, loco suo in domo prædictâ, post annum à tempore quo pacificam possessionem habuerit hujusmodi, vel per eum steterit, quo minus haberet eandem, sit eo ipso privatus, et alius subrogetur idoneus loco suo in

1788.

The KING
against
The Bishop
of ELY.

formâ et modo superius annotatis: Ordinamus etiam quod si quis scholarium deinceps admittendorum pensionem vel corrodiu, quoad vixerit, valoris centum solidorum fuerit assecutus, suo loco sit in dictâ domo eo ipso privatus; et si contra voluntatem magistri et scholarium post annum prædictum ibidem moretur, sit (utpote contra ordinationes nostras per eum juratas veniens) eo ipso perjurus, et talis per totam nostram universitatem prædictam per scholas ejusdem publicè nunciatur.

The following statutes of the college were annexed to the affidavits against the rule (a).

N^o 2. *De Nominatione et Præfessione Præfecti Domus.*

Statuimus, ordinamus, et diffinimus, ut dictæ *aulæ* seu domûs nostræ et ejusdem scholarium sit unus gubernator, qui magister seu custos domus *Cantabrigiæ* perpetuo nuncupetur, vir providus et discretus, congrue literatus in spiritualibus et in temporalibus, circumspectus morum, honestate præclarus. Et ipsius magistri officio qui tunc est, per cessionem, vel mortem, seu alio quovis modo legitimo deinceps vacante, senior scholaris domus duos vel tres de provectioribus et discretioribus scholaribus dictæ domus provideat et assignet, qui ab eodem seniore scholari et à singulis scholaribus dictæ domûs singulatim inquirant ipsorum duorum vel trium seniorum votis per duos post eos seniores scholares super hoc primitus inquisitis, si quos in spiritualibus et temporalibus discretos suo judicio et exercitatos in dictâ domo noverint pro officio magistri hujusmodi idoneos, et quos, vel si nullum talem (clericum) in eadem sciverint, tunc demum aliundè, in virtute juramenti cujuslibet præstiti ab eisdem inquirant; et cum isti duo vel tres omnes audiverint, tunc illi iidem tres, vel saltem duo ex iis, si unus eorum nominetur, et si fortè duo eorum nominentur, tunc senior scholaris non nominatus, cum tertio assignato, pensatis honestate, probitate, et industriâ singulorum, omni carnali affectione precibus et favore omnino semotis, duos quos magis idoneos pro magistri officio et domui magis necessarios intellexerint, ex his qui de domo, vel fortè nullis ad hoc sufficientibus in eâ, quod absit compertis extra eam, aliundè per dictos scholares fuerint nominati absque aliâ quâ-

* This statute was given by *Simon de Montacute*.

cunque juris solemnitate, domino *Eliensi* episcopo qui pro tempore fuerit dictæ domus patrono, sede plenâ, vel eâ vacante custodi spiritualitatis episcopatus *Eliensis* nominent et præsentent, suis literis sigillo communi domus in testimonium sigillatis, *quibus scriptis adhiberi volumus plenam fidem.* Episcopusque *Eliensis*, sede plenâ, vel eâ vacante custos spiritualitatis prædictus, unum de duobus hujusmodi nominatis et præsentatis, quem magis utilem intellexerit, dictis domui et scholaribus præficiat absque moræ diffugio in magistrum, ne domui et scholaribus dispendium inferat longa mora. Qui sic præfectus eisdem domui et scholaribus in eâdem domo commorantibus ejusdem domus œconomis et ballivis, ac omnibus ministris aliis quocunque nomine censeantur, quoad exteriorem et interiorem ministracionem seu regimen deputatis præmineat atque præsit.

1788.

The KING
against
The Bishop
of ELY.

Nº 3. *De Nominatione et Admissione et Conditionibus
Scholarium admittendorum in Domo prædictâ.*

Statuimus, diffinimus, et etiam ordinamus, quod vacante quovis modo legitimo alicujus scholaris loco in domo prædictâ, alium virum honestum, castum, pacificum, humilem, et modestum, quatenus humana fragilitas nostra finet, et indigentem, ac in arte dialecticâ baccalaureum, post determinationem suam habiliorem quem sciverint et habere poterint volentem atque valentem proficere prædicti magister et scholares, in virtute juramenti præstiti ab iisdem, sic conditionatum et non alium domino episcopo *Eliensi* qui pro tempore fuerit, vel, sede eâ vacante, custodi spiritualitatis episcopatus *Eliensis*, ad locum vacantem nominent, et, literis suis patentibus easdem testantibus conditiones, præsentent: qui quidem episcopus, vel spiritualitatis custos, hujusmodi literis *super hujusmodi conditionibus fidem inhibeat*, et talem nominatum et præsentatum in dictæ domus scholarem absque difficultate quâlibet sine ulteriori discussione admittat, et locum tunc in eâdem domo vacantem eidem assignet; cui sic admissio sicut aliis scholaribus sustentatio debita ministretur. Qui cum ad domum nostram venerit sic admissus juramentum coram magistro et scholaribus supradictis teneatur præstare, quod his nostris ordinationibus quantum in eo est obediet in omnibus réverenter. Hujus autem juramenti præstatio in domûs registro in testimonium conscribatur, *cui quidem registro quoad hoc eum oportuerit fidem volumus adhiberi.* Si vero hujusmodi conditiones in personis nemi-

nandis

1788.

The King
against
The Bishop
of Ely.

nandis et præsentandis concurrant, vel pluribus baccallaureis sic conditionatis inventis, quis sit eorum habilior inter magistrum et scholares, forsitan deceptetur, hujusmodi discordia magistri et duorum decanorum dictæ domus, discretione providè absque moræ dispendio decidatur, et etiam observetur decisio eorundem.

Nº 4. *De Obedientiæ Juramento.*

Statuimus et ordinamus, quod magister quilibet dictæ domûs in sui admissione et præfectione juramentum præstet episcopo *Eliensi* qui erit pro tempore, quod sibi et suis successoribus erit obediens in licitis canonicisque mandatis. Scholaris vero quilibet ejusdem domûs in sui admissione teneatur præstare simile juramentum.

Nº 12. *De Amotione Magistri propter Crimina vel suos Defectus.*

Statuimus et etiam ordinamus ut cum ipsius domûs magister qui pro tempore fuerit propter dilapidationem, vel aliam causam ad hoc sufficientem, ad regimen ad quod præficitur, reddatur inhabilis, et tanquam intolerabilis et inutilis, amovendus existat. Episcopus *Eliensis* qui est pro tempore ad denuntiationem vel insinuationem duorum vel trium seniorum scholarium dictæ domûs, ad quam omnes et singuli dictæ congregationis scholares sub suæ fidelitatis et juramenti debito teneantur, *summarie et de plano absque judiciali strepitu et figurâ judicii, præsertim cum bona dictæ domus litibus deservire non debeant*, de causis hujusmodi cognoscat ipsumque magistrum amoveat, justitiâ suadente; ac prædictæ domus scholares alium idoneum in ipsius amoti magistri locum surrogandum nominent et præsentent prædicto episcopo, præficiendum in magistrum absque moræ dispendio, prout supra in denominatione et præsentatione magistri plenius annotatur.

Nº 20. *De Numero Scholarium.*

Cum facultates domûs nostræ prædictæ, sicut supra diximus, pro sustentatione etiam tenui quindecim personarum, quarum una est magister et cæteri sunt scholares, vix sufficient in presenti; illum numerum et non ultra, ordinamus, statuimus, et decernimus ordinandum, donec Dei mediante presidio hujusmodi creverint

rint facultates ad sustentationem congruam eorundem; sed tunc, sicut eas augmentari contigerit, numerus scholarium per considerationem *Eliensis* episcopi de consilio majoris et senioris partis scholarium prædictorum prout juri congruit augeatur, qui in illo eventu conditionentur, nominentur, præsententur, et admittantur secundum formam et prout in titulo de nominatione scholarium plenius est notatum: alioqui si contra illam formam vel conditiones non habentes prædictas forsitan nominentur, præsententur, vel admittantur, nominationes, præsentationes, et admissiones, hujusmodi eo ipso irritæ sint et nullæ, nec jus in domo prædictâ acquiratur aliquo admissio sic.

1788.

The KING
against
The Bishop
of ELY.

Nº 21. *De impediētibz numerum Scholarium augmentari.*

Cum bona dictæ domûs contigerint augmentari, numerus etiam scholarium augmentandus est; et statuimus ad instar aulæ *de Merton*, et etiam ordinamus, quod numerus ille per magistrum ac decanos de omniumque scholarium consilio diffiniatur in communi, et etiam decernatur in congregatione scholarium specialiter ad hoc factâ, quod si per magistrum vel aliquum vel aliquos de scholaribus dictæ domûs pro suâ voluptate aut majori victualium abundantia prætendatur obstaculum, quo minus excreſcentibus facultatibus numerus pariter scholarium augeatur, si scholares fuerint, per magistrum de consilio decanorum, pœnâ quæ sibi æquâ videbitur, ab impedimento desistere compellantur. Quod si quis pertinax fuerit, et impedimento desistere noluerit, tanquam pro graviore crimine *ab ipsâ domo totaliter expellatur*. Si vero magister fuerit, qui augmento scholarium hujus se opponit, moneatur trinâ monitione duarum dierum spatium continente per dictæ domus decanos quod ab hujusmodi impedimento desistat; quod si facere neglexerit, per eosdem denuntietur episcopo *Eliensi*, qui eundem magistrum tanquam pro gravi crimine, nisi rationabiliter se excusaverit, a suo amoveat regimine supradictio: Et scholares prædicti sibi et domui juxta formam superius traditam *libere provideant de magistro, &c.*

1788.

The KING
against
The Bishop
of ELY.

N^o 44. *De Scholaribus qui se ad obsequia transferunt extra domum.*

This statute was inserted to shew that if any scholar wilfully absented himself from the college for more than six months *a loco suo et domo* prædictis auctoritate hujus ordinationis *sic eo ipso privatus omnino*, et alius idoneus subrogetur eodem modo et formâ quibus scholares alii admittuntur.

N^o 46. *Ut Scholares promoti habeant Collegium recom- mendatum.*

Cæterum cum beneficiarii obligatione quadam naturali suis benefactoribus obligentur ad beneficia pro viribus repensiva, virtutem vestram quatenus cum Deo possumus, inducimus, hortamur, et obsecramus, in domino *Jesu Christo*, quod vestrum quilibet, cui ad altiorem gradum in spiritualibus vel temporalibus, cum divino mediante præsidio, contigerit promoveri, domum prædictam ex quâ multa bona recepit, et in qua sumpsit sui honoris exordium, ejusdemque scholares et jura habere curet ex corde specialiter commendata, ipsarumque negotia gratitudinis benevolentia consiliis prosequatur et auxiliis quatenus poterit temporibus oportunis.

N^o 47. *De Suspicionem Criminis contra Magistrum vel Scholares subortâ.*

Cum autem famam cujuslibet esse deceat integram atque bonam, statuimus, et etiam ordinamus, quod si de gravi crimine vel lapsu carnis enormi sola fuerit contra scholarem suborta suspicio, famâ seu potius infamiâ differente, aut si quis crimen aliquod de levioribus commiserit, veluti inobedientiam levem erga magistrum, vel præpositum, seu jurgium leve cum magistro seu socio aut alias levis contentio fuerit suscitata, trinâ monitione per dictum magistrum vel decanos domus, si necesse fuerit, corripiatur, et etiam inducatur, ut in futurum, quoad suam famam, melius se habeat, et ab hujusmodi insolentiis se compescat, et disciplinis canonicis se coaptet; quod si spretâ
trinâ

trinâ monitione hujusmodi, suam famam miserabiliter neglexerit, aut casu alio contra suam emendationem negligens exiiterit, aut si diffamatus hujusmodi purgationem sibi per magistrum et decanos domûs inductam per suos bonæ famæ consocios dictæ domûs præstare noluerit vel nequiverit, vel defecerit in eâdem, *ab ipsa domo* absque spe regressûs auctoritate hujus constitutionis ejiciatur omnino per *Eliensem* episcopum, et perpetuo maneat sic ejectus.

1788.

The KING
against
The Bishop
of Ely.

Nº 50. *Ne Magistri vel Scholares amoti contra suas amotiones appellent.*

Cum sit parum ordinationes condere vel statuta nisi in suo robore conserventur, et hi quorum interest eisdem pareant cum effectu, statuimus, et etiam ordinamus, quod ejectis vel amotis magistro vel scholaribus aliquibus a domo prædictâ per ordinationes nostras prædictas, omne beneficium ejusdem domus et ipsius honorum participatio denegetur, nec eis occasione ejjectionis vel amotionis hujusmodi contra episcopum *Eliensem*, qui est pro tempore ejusdem domûs patronum, dictumve magistrum aut scholares ipsius domûs, *seu quoscunque alios de eâdem domo*, seu agendo, seu appellando, seu querelando, in integrumve restitutionem petendo, seu cujuscunque curiæ ecclesiasticæ vel secularis literas per se vel alios impetrando, obtinendo, contra ejjectionem vel amotionem suam prædictam directè vel per obliquum quomodolibet molestare presumat. Hujusmodi remediis et aliis quibuscunque scholaris quilibet in sui admissione renunciaret coram magistro et scholaribus. Magister vero coram scholaribus manifeste et de hujusmodi renunciatione servandâ juramentum præstet, ad sancta Dei evangelia specialiter coram illis; hujusmodi quoque juramenti præstatio in registro domus scribatur in testimonium sui præstiti juramenti, ac in confusionem et ruborem ipsius perjuri, et tanquam perjurus in universitate nostrâ *Cantabrigiæ* ab actibus magistralibus et scholasticis excludatur, et per ejusdem scholas publicetur perjurus, donec dictis magistro et scholaribus pro laboribus et expensis, quos et quæ hujusmodi transgressoris occasione sustinuerint, satisfecerit competentèr.

1788.

The KING
against
The Bishop
of ELY.

N^o 51. *Quod Episcopus visitet dictam Domum.*

Ut autem constitutiones hujusmodi, ad honorem Dei animarum salutem commodumque scholarium, et honorem debitè observentur, episcopus *Eliensis* qui est pro tempore, triennio in triennium, ante vel post, quoties opus fuerit, vel sibi videbitur, visitet dictam domum, in capite et in membris, et secundum inventorum excessuum quantitatem et qualitatem debitè corrigat corrigenda, et reformet prout expedire viderit reformanda.

N^o 54. *De antiquis Observantiis & Statutis.*

Statuta et observantias dictæ domûs antiquas, quatenus ordinationibus et statutis nostris prædictis non obviant, nec in aliquo eisdem derogant in suo, volumus et statuimus robore permanere, quibus non intendimus per præmissa in aliquo derogare.

[These statutes were dated at *Ely*, 1344.]

1663. On a vacancy of the mastership by death, the fellows proceeded to an election, and on 11th April 1663, returned Dr. Shippon and Dr. Barrow to bishop Wren. To which the bishop, after observing that, *after the time appointed by the statutes for the election to be made has elapsed, the power of appointment of right falls upon him*, proceeds to assign his reasons for rejecting their return. 1st. That only six fellows, out of fourteen, were present at the election, and therefore not all or the major part agreed in the first scrutiny. 2dly. That they did not wait three days for the coming of the others, nor went themselves to a second and third scrutiny. 3dly. That the first scrutiny was conducted by conspiracy and management. 4thly. That the return was surreptitiously obtained, and was not authenticated by a notary public. He then proceeds—

Quoniam igitur nobis antecessorum nostrorum vestigia prementibus, et in hoc casu decisionem eorum secutis, qui pro summâ suâ sapientiâ caventes contra factionem et studia partium, ne ipsam nominationem quidem duorum ad officium magistri concedere sociis collegii voluerunt, nisi sub hac provisione, ut omnes focii vel major pars eorundem in tali electione duorum atque ad visitatorem referendorum consentirent, aliter vero si res accide-

ret sibi et ipsis et episcopis *Eliensibus* pro tempore futuris ex integro reservari voluerunt jus et potestatem in tali casu preficiendi in magistrum collegii virum talem quem ipsi solum duxerint idoneum; visum nunc fuerit jure nostro episcopali et visitatorio uti et negotium hoc integrum ad nos recipere eoque intuitu totum illum processum ab illis in primo scrutinio habitum atque tot defectibus tam præviis quam subsecutis onustum vitiatumque repudiare, parique ratione etiam et literas illas testimoniales electionis suæ pro irritis cassisque habere, totumque prætentæ illiusmodi electionis de cursu ne utiquam acceptandum a nobis aut confirmandum esse, sed prorsus excludendum esse atque annullandum, prout jam per sententiam nostram definitivam, accersita aliunde quam a sex viris illis plenaria atque fide digna ratione circumstantiarum omnium in dicto negotio, per præsentem pronunciamus, &c.

He then declares the election and return to be null and void, and by his episcopal and *visitation* power he confers the mastership on *Joseph Beaumont*, assigning as a reason, amongst many others, that he had been educated for many years at *Peterhouse*. He therefore directs the college to admit *Beaumont*; and then says, Porro autem præcipimus nobis ut post executionem hujus mandati nostri nil moremini illud in perpetuam rei memoriam, rectamque explicationem futuris temporibus statuti de electione magistri, inter acta referre, curareque ut in registro collegii fideliter inferatur, ne deinceps erretur a sociis in eodem genere, ante proximam nostram collegii visitationem de qua iteranda videmus jam necessitatem nobis, &c. Dated 21st April 1663.

In the appointment of *Beaumont*, it is stated by the bishop to be made jure per statuta collegii reservato pro hac vice.

There appears on the register also the form of a letter missive of *Symon* bishop of *Ely*, in 1693, to the college, commanding them to admit *Thomas Stukes* into a fellowship, sometime vacant by *John Woodward* having omitted to take the oaths to government. In which letter he says—Cumque jus nominandi ad dictum locum sive societatem jure devolutionis et per lapsum temporis ad nos dictæ domus visitatorem notorie dignoscitur spectare et pertinere; nos itaque pro auctoritate nostrâ visitatoriâ quæ fungimur, &c. appoint *Thomas Stukes*.

There are other instances stated of the same bishop's appointing to fellowships, where disputes had arisen in the college respecting the election of a fellow, and the master and the two

1788.

The King
against
The Bishop
of Ely.

1788.

The KING
against
The Bishop
of ELY.

deans had taken upon them to appoint to the vacancy, which the bishop declares to be null and void; and *the time of election having elapsed, he appoints other persons by virtue of his visitatorial authority.* There is also another instance of an appointment under similar circumstances by *Peter*, bishop of *Ely*, in 1676, wherein he states that he had *indulged* the fellows with a second election to no purpose. A similar instance of the same bishop's appointing in 1677, and the admission of *Binks* his appointee. There is also an entry made and signed by the master and fellows on 3d February 1676-7, *recognizing and acknowledging the bishop's right, as visitor, to appoint in cases where the election is declared null and void, and acquiescing in his appointment in the instance last mentioned.* There is also another entry made and signed by *Thomas*, bishop of *Ely*, dated 28th June, 1749, as follows;

Thomas, by divine permission, bishop of *Ely*, to our beloved in *Christ*, *Edward Osborne*, of our college of Saint *Peter* in the university of *Cambridge*, bachelor of arts, greeting.—We hereby confer upon you the place or fellowship in our college or house of Saint *Peter*, in the university of *Cambridge*, vacant by the resignation of *Shallet Turner*, master of arts, late fellow of the same, *which place or fellowship, through the nullity of the late pretended election into the said fellowship, belongeth by right of devolution to the collation of us the said bishop of Ely, as visitor of the said college;* and we do also admit and institute you the said *Edward Osborne* perpetual fellow of the said college or house of Saint *Peter*, and invest you in the said fellowship, together with all commodities, emoluments, rights, privileges, and interests, in any wise due or belonging to the said place or fellowship, &c.

Then followed the bishop's letter to the college, commanding them to admit *Osborne*, and his admission into the same.

This mandamus was applied for in last *Michaelmas* Term on these grounds; that the bishop of *Ely* was bound to appoint one of the two persons nominated by the fellows, the sole power of judging of the qualifications of the persons to be returned being given to them by the statutes of the college. That the only event in which the bishop of *Ely* had a power of appointing was in case the fellows could not agree upon the return after a third scrutiny. And though the bishop was the visitor of

Peter-

Peterhouse, yet this power of appointing to the mastership in a particular case was not given to him as visitor, because the same power was given to the guardian of the spiritualties during the vacancy of the see, who clearly is not visitor. That even supposing the return made by the college not to be conclusive of the propriety of their election; yet it appears from the statute of election that the fellows were not bound to prefer Mr. *Longmire*, who was an independent member of the college, to Mr. *Barnes*, who was a member of another college; for the preference is only directed by the statute to be given to the dependent members of *Peterhouse*, "ut ipsius domus atque sociorum ejusdem semper ratio habeatur." The word "domus" must be confined to the *foundation*, the *corporation*, and cannot include all those who are upon the boards of the college.

Bearcroft, *Partridge*, *Milles*, and *Yorke*, shewed cause, insisting, first, That this court had no jurisdiction over the question, because the act complained of was done by the bishop of *Ely*, as general visitor of the college, who having as such the sole right of expounding the statutes of the college, and determining matters of election, had pronounced a sentence: and secondly, If the court could enter into the question, that the bishop was right in his construction of the statutes.

First, the bishop of *Ely* is general visitor, and invested with the most absolute powers which can in any case be annexed to that office. His situation, with respect to the college, is peculiar; he is to be considered in the light of patron and confounder. For it appears from *Bentham's* history of *Ely*, and may be collected from the preamble to the statutes (wherein it is recited that the college was founded by the consent, and with the confirmation, of the prior and convent of the cathedral of *Ely*) that the property of which the college was endowed was not a part of the private patrimony of *Hugh de Balsbam*, but of the temporalities of the see. So that the visitatorial power not being otherwise disposed of necessarily descended upon the successors of *Hugh de Balsbam*, who stand in the place of the heirs of a private founder. But supposing the college to have been founded out of the private estate of *Hugh de Balsbam*; it appears that the only step he took, with respect to its regulation, that is known of, was to place it under the control and direction of his successors, by directing it to be called, The Hall, or College, of the Scholars of

1788.

The KING
against
The Bishop
of ELY.

1788.

The King
against
The Bishop
of Ely.

of the bishop of *Ely*, which was in effect appointing them general visitors (a) of his foundation, his intention being manifest. In point of fact, they have successively exercised this authority (b) from the time of his death, collating the masters and fellows at their discretion, from that period to the time of *Simon de Montacute*, the seventh in succession from the founder, he being the first who gave a code of laws, and indulged the society with the election of their master. These circumstances, it was contended, were at this distance of time strong evidence that *H. de Balsham* appointed the bishops of *Ely* to be general visitors of his college; and as he gave no statutes whatever that appear, he must be supposed to have invested them with this authority absolutely, without limiting or circumscribing it (c) in any respect whatever. The necessary consequence is, that the powers of making, altering, repealing, and interpreting laws, of hearing appeals, of deciding on elections, and of deprivation, became vested immediately in the bishops of *Ely* by operation of law, so that their authority must be considered as co-ordinate and co-equal. It may be a question therefore, Whether, supposing any of the statutes of *Simon de Montacute*, or of any other visitor, to be restrictive of any of the general incidental powers abovementioned, such restrictive statutes would not be void against his successors. It has been doubted, whether even a founder (d) can take away or restrain that part of a visitor's authority which is given by implication of law. But that point is at present out of the question, because here the founder gave no statutes at all. But admitting that a founder may circumscribe his visitor's power as much as he pleases, surely the case of a visitor, with respect to his successors, whose powers are equal to his own, is widely different. It is now generally held for law, that a visitor cannot repeal or alter the constitution given by the founder, unless power is expressly given him for that purpose. *Burr.* 201. What is the constitution given by the founder in this case? That his college should be under the perpetual control of the visitors appointed by him, as completely as may be by law. This declaration of the founder, coupled with the powers incidentally given by the law, must have exactly the same force and effect as if he had expressly directed in words that all the bishops of *Ely*

(a) *Fitz.* 305, 380. *Burr.* 200.(b) *Bent.* Hist. of *Ely*, p. 147, to 159.
Attorney General v. Clarehall. 3 *Atk.* 662.(c) *Philips v. Bury.* post. *T. Jones* 175.
Teddington v. St. John's College. *Burr.* 158.
(d) *Ld. Raym.* 9.

1788.

The King
against
The Bishop
of Ely.

in succession should make ordinances for his college; should alter, repeal, and interpret them, as might be necessary; should determine all disputes, and do every other act which a general visitor can do. Therefore, for one of the bishops of *Ely* to surrender or restrain any of these incommunicable branches of his authority, or by negative and restrictive statutes to attempt to bind his successors, would be to make regulations contrary to the original constitution of the society, and to alter a law primary, and, because given by the founder, unalterable. The circumstance of the code which was given by a visitor having been assented to by the master and fellows cannot vary the question; for if the statutes so given tended to limit the power of controlling their proceedings, it would be to their interest to consent; and in foundations of this kind, the consent of the society is not necessary to give validity to the laws promulgated by the founder or his representative; if the members of it submit to receive the bounty tendered to them, they must be bound by the terms prescribed. Lord *Holt* in *Phillips v. Bury*. But admitting that the bishop of *Ely*'s jurisdiction on the present occasion is to be decided by the statutes now produced to the court, it appears from them that the visitatorial authority is most fully vested in him. Throughout the statutes he is called *Patronus*; the college is always called *nostra domus*; and the stile of all the instruments, whether collegiate or episcopal, now extant in the register of the society, is, of the former, *vestri humiles filii scholares domus sive collegii vestri*; and of the latter, *dilectis filiis nostris episcoporum Eliensium scholaribus* (a). Again, *episcopus Eliensis, qui est pro tempore, de triennio in triennium, ante vel post, quoties opus fuerit, vel sibi videbitur, visitet dictam domum, in capite et in membris*. In the 50th statute it is expressly declared that neither the master or the fellows who shall be expelled by the bishop shall have any appeal against his judgment. The master and fellows are directed by the statutes to take a solemn oath on admission to obey the bishop of *Ely* in all lawful commands; and the ultimate choice of them, in all cases, remains in the visitor, as the fittest person to distinguish between the merits of the respective candidates, for the benefit of the foundation. This being the bishop of *Ely*'s general visitatorial power, the question is, whether he had not jurisdiction in this particular instance? If a return, [ordered to be made by the statutes ac-

(a) Vi. ante the College Returns, and extracts from the Register.

1788.

The KING
against
The Bishop
of ELY.

according to the conditions prescribed, of persons possessing certain qualifications] had been made not conformable to the statutes, of persons quite the reverse, of persons excommunicated, expelled the university, or of no degree, and one of the fellows had appealed, the visitor undoubtedly would have a right to receive, to hear, and to determine it. Or if the fellows should have all agreed on such a return, and the visitor, from his own knowledge of the college and of the persons returned, or from regular and satisfactory information, had been assured of such facts, by his general visitatorial power he might examine and decide upon it. Such a return would be considered as no return at all; and the visitor only, who is the judge for such purposes, can so determine it. In this case the parties protesting conceived that he acted under such authority; for they referred him to consider his *judgment*, not questioning his *jurisdiction*. If then this subject be in its nature of visitatorial cognizance, the question is, whether the power of the visitor is in this instance limited? In the first place, if it be a dubious question, upon the construction of the statutes, whether or no a visitor has jurisdiction in a particular instance, it follows, as a necessary consequence of the visitor's power of interpreting the statutes of the college, that he must determine the point, and this court will compel him so to do. *R. v. the bishop of Lincoln*, T. 25 G. 3. B. R. is decisive upon this point. In the present case, by receiving and determining on *Longmire's* representation, the visitor has in fact made an exposition that he had such a jurisdiction; and this court must be bound by his determination (a). In the *Attorney General v. Clareball*, lord *Hardwicke* (b) said, "If he is to expound, I must be bound by that exposition upon the statutes, and in cases arising under them, found my judgment upon it." He adds, "that shews the absurdity of the court's interposing in such cases; and that the visitor's exposition is final, when they come in question." If it be objected on this head, that by these means the visitor may enlarge his jurisdiction as he pleases against the express words of the statutes, and deprive third persons of rights conferred upon them by the founder; the answer to it is, that where the visitor is clearly circumscribed in his power of making and altering laws, and where the words are

(a) *Att. Gen. v. Clareball*, 3 Atk. 662. | *Toddington v. Burr*, 158. (b) This is taken from *Ld. Hardwicke's* own note of that case.

express

1788.

The KING
against
The Bishop
of ELY.

express and clear, such a determination by him would be considered, not as an interpretation, but as a repeal, of the statutes. But when the words of the statutes are dubious, or any thing is to be supplied by implication, it is the peculiar province of the visitor to decide upon them. And there is an obvious distinction between cases where a founder has given rights and privileges to his college absolutely, and where he has given them under specific limitations and conditions. Who is to judge whether these are properly complied with but the visitor? But even supposing in this case that the visitor has no power to decide on elections, &c. considered as a separate branch of his authority, yet as he has an indisputable right to interpret the statutes, and has in fact given an exposition of the statute *de qualitate*, which exposition appears to the court, according to lord *Hardwicke's* opinion in *Mapletoft's* case the court must be bound by and follow it. But upon the statutes the bishop's right of judging on elections is not restrained. There must be negative words to take away a general visitor's incidental powers, and no modification of them will do it (a). In *St. John's College v. Toddington*, lord *Mansfield* said, (b) "*sit visitator* is a sufficient delegation of the entire power, and he (the founder) may afterwards lay down rules for the exercise of it in particular cases: but such a modification will not take away the power incidental to the right of visitation, such as to determine upon complaints or appeals, to expel or deprive, or to judge on elections." But if the bishop of *Ely* be ousted of his visitatorial jurisdiction in this instance, it must be done by implication, and that by no means plain. The words of the statute *de electione magistri*, as applicable to this part of the argument, are, after describing the mode of election by the fellows, "Quo demum facto, volumus item, ac statuimus, ut eisdem
" duos absque ullâ juris solemnitate aut longiori expectatione
" domino *Eliensi* episcopo qui pro tempore fuerit, dictæ domus
" patrono, sede plenâ, vel eâ vacante custodi spiritualitatis episcopatus *Eliensis* nominent et præsentent, suis literis sigillo communi domus in testimonium sigillatis, quibus intra scriptis
" adhiberi volumus penam fidem. Episcopusque *Eliensis* sede plenâ, vel eâ vacante custos spiritualitatis prædictus unum
" de duobus hisce nominatis et præsentatis quem magis utilem
" intellexerit dictis domui et scholaribus præficiat in magistrum,

(a) 4 *Mod.* 109. 1 *Rel. Abr.* 514. G. 2. |
Ld. *Raym.* 9.

(b) This was read from a manuscript note of this case taken by the late Mr. *Anguish*.

1788.

The KING
against
The Bishop
of ELY.

"ne domui et scholaribus dispendium aliquod inferat longa
"mora." The statute then provides that if the fellows shall
not have agreed upon two proper persons in the first scrutiny,
they are to go to a second and third scrutiny: it then goes on,
quod si in tertio scrutinio quod omnino intra triduum a primo die
electionis haberi volumus non consenserint, tunc illum in ma-
gistrum volumus præfici quem episcopus *Eliensis*, sede plenâ, vel
eâ vacante, spiritualitatis custos, duxerit idoneum. Here a case
is supposed when a return by the fellows would be unstatutable
and void, namely, if they did not agree on a third scrutiny. If
that fact be disputed the visitor must judge of it, because the
founder has appointed no other judge. If such a fact exist, the
return is null, and the election is void; in which case the bishop
of *Ely* or the guardian of the spiritualties is to appoint; so that
the right of judging of the legality of the return, and of ap-
pointing, in case he adjudges the return to be void, is vested in
the bishop of *Ely*. If it had been intended that these rights
should have been separated, the statutes would have specially ap-
pointed some other person to judge of the validity of the return;
but it is now left within the general scope of visitatorial autho-
rity, from whence no court of law can remove it. But
it will be objected that as the return is directed to be made
in the vacancy of the see to the guardian of the spiritualties,
who is not the visitor, and the same power of appointing is given
to him, the statute cannot mean that the bishop of *Ely* should
receive and judge of it in his ordinary character of visitor, but
that he is to be considered, as to the election of master, merely
in the light of an inductor specially appointed by the legislator,
having no powers in this respect but such as are expressly and
specifically given him. The answer is, that whatever the
powers of a guardian of the spiritualties may be on occasions
like the present, this is not that case, but that of a bishop who
is indisputably general visitor of the college. That although it is
not a necessary part of the visitor's office to act in the character
of inductor, yet the offices are by no means incompatible, and
if a visitor is also appointed inductor he is not therefore the less
visitor, nor can thereby be prevented from exercising so useful a
branch of his incidental authority as that of judging on the
regularity of the election of those who are returned to him.
Besides every election in colleges, which are under the control
of visitors, must, in fact, ultimately be confirmed by them; be-
cause

cause it is their duty and within their power, if upon a visitation a person is found in college without a title, to turn him out, as is expressly said by Lord *Hardwicke* in *Mapletoft's* case. Therefore the conferring such an office as that of inductor upon the general visitor seems rather to strengthen his authority; at most it is but a modification of it, which according to Lord *Mansfield* is not sufficient to take away or restrain his incidental powers; and indeed the legislator could never have entertained the idea that, by directing the return to be made to the visitor, he should deprive him of the power of judging whether it was statutably made or not, for he directs him to receive it as visitor, *episcopo Eliensi, dictæ domus patrono, nominent & præsentent*. And it would be strange to argue that the bishop has no more power than the guardian of the spiritualties, who is evidently intrusted with a special and limited authority in certain cases, that the necessary business of the college might not be at a stand during the vacancy of the see, it being usual in those times for the crown to keep the bishopricks vacant for a long time, for the sake of enjoying their temporalities. If the objection is to hold, the government of many colleges will be affected, for *All Souls*, *Merton*, and *New Colleges* are precisely in the same situation with *Peterhouse* in this respect. In *New College* a case exactly similar to the present arose while Dr. *Hoadley* was bishop of *Winchester*, who as visitor rejected the return made to him of Dr. *Purnell* to be warden of *Winchester* college, on account of the election being in his opinion unstatutable; and nominated another person as upon a devolution to him. That was a case of great party consequence, and very much agitated at the time; and though the opinions of the most eminent counsel were taken on the subject, Dr. *Purnell* met with no encouragement to bring his case into *Westminster-hall*. This is at least an authority to shew that according to the general opinion of lawyers at that time, the matter was solely a question of visitatorial cognizance. If it be contended that the words "*quibus intra scriptis plenam fidem adhiberi volumus*" preclude all enquiry into the merits of the election, and are conclusive upon the bishop, the answer is, that by such a construction the visitor, the injured candidate, and the dissenting fellows, must be held for ever bound by the return; and the consequence would be that the college might elect unqualified persons without con-

1788.

The KING
against
The Bishop
of ELY.

1788.

The KING
against
The Bishop
of ELY.

trol, which would be extremely dangerous. The expression can relate only to the fact of an election being had, and to the authenticity of the instrument under the college seal. The statutes of *Peterhouse* expressly refer to those of *Merton College in Oxford*, and an anxiety is expressed that the same government should be established in *Peterhouse* as existed in *Merton*. Now in the *Merton* statutes, the words are "*absque ullâ aliâ probatione*", which explain the meaning of the words in this statute. And in the statute which directs the fellows to take an oath on admission, there is an explanation of "*fidem adhiberi*"; for there, after directing the oath of the newly admitted fellow to be entered in the register, it says "*cui quidem registro fidem adhiberi volumus*". This may be considered as an explanation of the sense in which the words are used in the statute "*de electione magistri*"; and this passage shews that the words in the other statute are not conclusive on the merits of the election. It may perhaps be said that the oath of the fellows is a sufficient security for the propriety of their election, but the facts of breaking that oath, or of improper conduct on the part of the fellows, are still to be enquired into. Otherwise it would preclude every enquiry by the visitor over the conduct and manners of the master and fellows, who take several oaths on their admission in all colleges, which is indisputably within the visitor's jurisdiction. The seal being affixed to the return would not even preclude the evidence of this fact, that the seal had been surreptitiously put to it. It is true that the statutes direct the visitor to appoint *without delay*: but his office is judicial, and not ministerial; so that he has a right to take a reasonable time to consider (a). Besides the right of the fellows to return is expressly on condition that they return *duos hujusmodi*, namely, of the qualifications enumerated in the statute, and there are words of reference throughout it. If they do not, their return is void; and nobody but the visitor can judge of the qualifications of the candidates. If the construction contended for is to govern, the visitor must appoint one of any two persons returned to him, be they ever so improper, which is perfectly absurd: besides the instant he was appointed, it would be his duty, as visitor, to deprive him as unqualified (b). The statute respecting the election of fellows affords a decisive comment upon the sense in which the words *plena fides* were

(a) *Br. Quare Impedit*, pl. 91.(b) *The Attorney General v. Clarehall*, 3 Atk. 662.
intended

intended to be used. The first of these statutes, enumerating all the qualifications of the candidate, says "*sic conditionatum et non alium domino episcopo Eliensi ad locum vacantem magister et scholares nominent;*" so that they are expressly restrained to persons of those qualifications. Yet in this statute the visitor is directed *adbiberi fidem* to the return made to him, but in the statute *de numero scholarium* it is expressly said *si contra formam illam aut condiciones non habentes prædictas forsitan nominentur præsententur vel admittantur, nominationes præsentationes & admissiones hujusmodi eo ipso irritæ sint & nullæ*, which clearly shews that the legislature did never intend that the return to the bishop either in the case of master or fellows should be conclusive whether the conditions prescribed by the statute were complied with or not. But even if there were any doubt on the words of the statute, the practice which has obtained in the college indisputably proves the visitatorial authority to the extent now claimed. The instance of bishop *Wren's* appointing *Beaumont* in the year 1663, when the fellows had returned two others, is decisive on this head. That case is stronger than the present, for there the bishop acted without any representation at all. That instance proves, not only the fact of the visitor's having interfered and appointed, notwithstanding the fellows had agreed upon a return, but it is also the strongest evidence that the college has always considered that interpretation of the statutes to be the true one, since it was at that time ordered to be inserted in the college register, and has always been acquiesced in. These instances have always been allowed weight when cited as authorities in cases of this kind (a). There are likewise five instances in which the bishop, as visitor, has appointed fellows, either because they did not follow the directions of the statute in the election, or because they made no return at all; in all which instances the college acquiesced, and in one instance expressly and in terms acknowledged the visitor to have been right; nor is there a single instance in the college in which the visitatorial power in this particular was ever disputed till the present. If it be objected that the visitor here, having claimed a right of appointing the master in consequence of the nullity of the return, is not to be allowed to sit in judgment upon it, being interested in the cause: this ob-

1788.

The KING
against
The Bishop
of ELY.

(a) *Burton's case*, cited by lord *Mansfield* in *Todington's case*, *Burr.* 192.

1788.

The KING
against
The Bishop
of ELY.

jection proceeds on the idea of the visitor's power being suspended in this instance ; and the case of *Manchester College* will be cited in confirmation of it. But that case differs materially from the present. There, the visitor had appointed himself warden, and made a return to the mandamus in the latter character, and that he together with the fellows had distribution and management of the revenues of the college, and was himself precisely in the situation of those whom as visitor he was intended to control. So that the court very properly determined in that case, that the visitor could not sit himself, it being contrary to reason, and to the fundamental principles of visitatorial power. It is a case *sui generis* ; and even there the legislature saw the inconvenience of drawing these questions into the courts of law, and passed an act declaring that under similar circumstances the king should visit the college ; a circumstance which proves how much this *forum domesticum* is favored in law. But, first, this power of appointing claimed by the visitor is not an interest ; and secondly, if it be, it is no objection to a visitor's jurisdiction. As to the first, this power of appointment is not an interest within the meaning of the rule. It must be some *beneficial interest* obviously capable of influencing the mind, and not merely a technical interest. *Hardr.* 503. And in the case of the city of *London v. Wood* (a), Lord Holt ridicules the idea of the incapacity of one of the freemen of *London* sitting as judge, merely because he was to have a share in the penalty. It is no objection to a judge that he is a bare trustee. An executor, who takes no beneficial interest is a competent witness to prove the testator's sanity (b). The interest which renders a witness incompetent is, where there is a certain benefit or advantage attending the determination one way (c). And in *The King v. The Mayor of London*, *Scroggs* Chief Justice, said, the question always is, whether the interest be so considerable as by presumption to produce partiality or not? 2 *Lev.* 231. But the power of appointment, claimed by the visitor in this case, is no interest. This appointment, is a case of necessity, if the fellows make no election, or a void one, which is the same thing, within the time limited ; the visitor as the representative of the founder must appoint, or the college must be without a head ; and in the situation of public corporations who had missed their charter day before the statute of

(a) 12 *Mod.* 686. (b) *Dougl.* 139. (c) *Bul. N. P.* 284.

Geo. 1. The circumstance of the power being given to the visitor, and to the guardian of the spiritualities in the vacancy of the see, cannot vary the case; for the law would have imposed it on the visitor as a duty, and compelled him to execute it, though the legislator had not expressed it; so that his having expressed it cannot make it an interest, if it be not so in its nature. It may be said, perhaps, that the power of appointing, claimed by the visitor, is limited by the statute to a particular case, namely, where the fellows have not been able to agree; but it is not necessary to argue that point in the present case; the only questions being, whether he had a right to declare the return null and void, independently of contingencies which might arise afterwards; and whether if he had, he was capable of judging of it in this particular instance, having acted under a supposition that he had such a right of appointment as he has exercised. If it were, it would not be difficult to shew that the provision above-mentioned was introduced for the purpose of giving the power to the guardian of the spiritualities in the vacancy of the see, who would not otherwise have had it, not being visitor; and that it extends as well to cases of void elections, as to those where there has been no election at all, upon the true and reasonable construction of the statute, there being words of reference to the qualifications of the persons to be returned throughout. The evident meaning of the statute is, that the college must agree within three days upon a return of two persons qualified according to the conditions of the statute; if they do not agree within that time upon two such persons, any other return must be considered as no return; and the conclusion is, that they have not agreed. A false return is no return. 10 *Mod.* 57. A presentation of a person unqualified, is no presentation; if it were, the lapse would begin to run from the rejection of the candidate, and not from the death of the incumbent. If this be the true construction, then the bishop had a power of appointing to the headship under the express provisions of the statute: if the words of the statute are capable of a different construction, then the bishop might appoint *jure devolutionis*, which is a power vested in him of necessity, and arising from the very nature of the foundation, and cannot therefore be contended to be an interest; but is a mere duty and trust like the case of a lapse (a), and goes to his successor, and not to his executor. And a lapse

1788.

The KING
against
The Bishop
of ELY.

(a) *Brit.* fo. 225. *Hob.* 154. 1 *Roll. Rep.* 464. 475.

1788.

The KING
against
The Bishop
of ELY.

is rather an administration than an interest. *F.N.B.* 34. *Dy.* 87. A lapse is an office of trust, reposed by law in the ordinary, metropolitan, and lastly in the king; the end of which trust is to provide the church with a rector in default of the patron. *Hob.* 154. *Plowd.* 498. *b.* 322. *a.* If it be objected that this lapse is brought about by the judgment of the visitor, who claims upon such judgment to appoint; the answer to it is, that it is occasioned by the neglect or breach of duty of those who should elect; and every lapse is of that nature where the ordinary rejects. If a spiritual person present an illiterate clerk, the ordinary may refuse to admit him, and need not give notice of the insufficiency to the patron; and a lapse is incurred. The law supposes him to judge of the ability. *Keilw.* 49. *b.* 18. *H.* 7. But, secondly, the rule is not in any case applicable to a general visitor. The visitor is precisely in the place of the founder, if not restrained, and is completely the *fidei commissarius*; and there is no doubt but the founder himself might appoint. This is like the common case of a decision of proprietary rights; it is of a private nature. The patron or founder had an absolute power to arrange it; he may dispense with principles which the common law or ecclesiastical law would hold indispensable and essential. He may provide absurdly, and may give absolute and unlimited power over the subject of his benevolence to whom and in what manner he pleases. This is very ably commented upon by lord Holt, in *Philips and Bury* (*a*). In *Dr. Walker's* case (*b*), it was said by the court, that "a visitor was to be obeyed by the members of eleemosynary foundations, as members of a family are bound to obey the master." *Green v. Rutherford*, 1 *Vez.* 472. is to the same effect. But the rule cannot apply here; for this is a judicial act, independent of all consequences, and must be judged of upon the rules which govern such sentences, and the persons who give them. The presumption is universal in favour of the sentence of a competent jurisdiction, that the judge is impartial; and the consequences of the judgment cannot be a ground to rebut such a presumption. This appears most clearly from the cases of *The King v. Sir G. Heathcote* (*c*), and the *King v. the bishop of Chester* (*d*); in the first of which it was held that the same persons, who had a right to choose out of a return, were not therefore

(*a*) *Skin.* 480. *Vide post.*(*b*) *Rep. Temp. Hard.* 218.(*c*) 10 *Mod.* 48.(*d*) 1 *Wils.* 206. 1 *Bl. Rep.* 22.

1788.

The King
against
The Bishop
of ELY.

ousted of their jurisdiction over the return itself. And in the latter case the very objection, that the visitor was interested because he was to appoint in case of a vacancy, was taken, but it did not prevail. If an interest were an objection to the visitor's power of appointing, it would equally hold in cases of deprivation; but in such cases the objection was never thought tenable. *Fitz. tit. Assize*, pl. 50. The case in 8 *Ass.* 29. 31. is decisive on this point. The case of a donative is to the same effect; the patron of the donative is the visitor, and he may deprive without shewing any cause. The founder undoubtedly might deprive, and dispose of the vacant place; and the visitor possesses all his powers. That the same person may deprive and appoint, appears from the cases of *The Attorney General v. Middleton* (a), *Rex v. The Bishop of Chester* (b), and *The Attorney General v. Sir John Lock* (c). A strong argument is to be drawn from the form of pleading in deprivations (d), and of returns to a *mandamus* which only state that the visitor deprived for certain causes, and that the office is full. Now if such an appointment by the visitor were an objection, it would be a good exception to the return or the plea, because it should state how the office was filled. Perhaps it may be objected that the bishop's proceedings have been founded on Mr. *Longmire's* representation, who not being a member of the college has no right to appeal to him, according to *Davidson's* case and that of *The King v. Grundon* (e). But it is begging the question to state that *Longmire* is not a member of the college, it being very much a matter of construction of the statutes who is or is not within that description. For the founder may confer complete or partial privileges, and this is a mere question of proprietary right, on which it is the visitor's peculiar province to decide, and is like the cases of *Mapletoft* and *Todington*, neither of whom were members of the colleges in which they respectively claimed to be admitted. The cases above alluded to proceed on quite different grounds, for the very subject matter of the appeal in this case is a claim to be considered as a member of the college; and on that account to have a preference as against total strangers.

Another objection may perhaps be raised that there was no judicial sentence, no regular appeal, and that both parties should have been heard, or at least cited to appear. The answer is that

(a) 2 *Vez.* 327.(b) 1 *Wils.* 208. 1 *Blac. Rep.* 22.(c) 3 *Atk.* 464.(d) *Rast.* fo. 1. *Trem. P. C.* 479, 484.(e) *Cowp.* 315.

1788.

The KING
against
The Bishop
of ELY.

it is not necessary for a visitor in any case to summon and hear the parties in order to his giving judgment upon it. Not even in the case of deprivation, which is much stronger than the present; 8 Aſ. 31. is decisive; and the argument from the pleading and returning deprivations seems to confirm the position. In these it is never set forth that the visitor cited the party, or gave him an opportunity of making a defence. Besides it does not appear that the college ever demanded to be heard, and the visitor has in point of fact given a sentence. If he had not, the court might perhaps have granted a *mandamus* to him to compel him to hear the parties, in order that he might determine; as in *The King v. The Bishop of Lincoln* (a). But here he has made a judicial sentence, and this court is precluded from entering into the form of his proceedings however erroneous they may be. Lord *Holt* said "The manner of a visitor's administering his power is not material for the consideration of the court; The only question is, whether he has jurisdiction? If he hath jurisdiction and cognizance of the matter, and he gives a sentence in the matter, his sentence must have some effect to make a vacancy, be it never so wrong: but there is no appeal unless the founder has appointed one. For there is none by the common law." And in the same case *Eyre J.* said "If there is a visitor we give credit to him, and intend all right in form." But in this case no regular appeal was necessary; no other persons but the fellows, who returned, were concerned; a representation therefore of *Longmire*, who thought himself aggrieved by the act of the fellows, was sufficient. The deputies of the college had stated the idea of the fellows upon this part of the statutes, and if they had been regularly heard, the same claim supported by the same reasons would have been repeated; If the visitor were satisfied that the statutes were not complied with, if as a precedent he thought it operated to evade his power and authority in having a legal option of two persons qualified according to the statutes, that, according to lord *Holt's* opinion, would be a sufficient cause of deprivation. Then if it would be sufficient to deprive from an actual possession and enjoyment, it was clearly enough to rebut a claim, and to vacate the act by which such claim was attempted to be enforced.

The consequences of this court's interposing in such cases would be fatal to the peace and good order of these corporations.

(a) Tr. 25 Geo. 3. B. R.

They are private societies established for particular purposes, and ought to be governed solely by the laws of the founder: They are like the inns of court, in the regulation of which this court has never interfered. In this instance the founder has appointed a visitor, who is to superintend the government of the college, and to expound the statutes. If the visitor cannot judge in this case, the court must judge of the statutes, and of the qualifications of candidates in every case, which can affect the validity of the return. The visitor may himself become the appellant against the return of the college over which he is held to have *absolutum dominium in omnibus licitis*. As guardian of the statutes, and promoter of the founder's object, he must see that the statutes are complied with. This court may construe the statutes in direct contradiction to his understanding of them. Then is he to act from his conscience, or is he to be guided by such an exposition as this court shall make?—He cannot be *fidei commissarius*, or accountable as such, whilst his conscience is submitted to the directions of a court separate from, and independent of, the founder. In the case of *St. John's College v. Todington* (a) lord Mansfield said “I am satisfied upon mature reflection that the college would tremble at the consequence of leaving every election into these fellowships, or any other disputes concerning them, open to the courts of law, and the expence and delay attending on them. And in *The King v. Sir G. Heathcote*, Eyre J. said, It ought to be the concern of a court of justice to take care that, whilst they are granting a remedy to one, they do not at the same time expose others to great inconveniences.”

But if the court shall be of opinion that they are not precluded by the visitor's determination from entering into the question on the real meaning of the statutes of the college, the construction which the bishop of Ely has put upon them is the correct one. It may be a considerable question how far the royal visitors in the reign of Edward the sixth had a right to make such an alteration in the statutes as this; for by the old statute of *Simon de Montacute* no person could be chosen out of the college, while there was a *clericus* within; in which case the return made by the fellows would be clearly void. Admitting however for argument's sake the validity of the latter statutes, the bishop's construction is right. First “*domus*” as used in this statute is not confined to

1788.

The King
against
The Bishop
of Ely.

(a) 1 Bur. 203.

1788.

The KING
against
The Bishop
of ELY.

the corporation, but includes all those within the walls of the college, and Longmire is of that description; And Secondly, according to the academical and grammatical construction of the statute, Longmire is entitled to a preference upon this return above Barnes or any other person *aliunde*. As to the first; It is observed that the present statutes, relating to the election of the master of Peterhouse and his qualifications, were given in the reign of Edward the Sixth by the very same persons who gave the injunctions and statutes of the university; and in these it is notorious that the words *domus* and *collegium* are used in the most enlarged sense, and comprehend in general all persons upon the boards; and *contemporanea expositio fortissima est in lege*. So that the word *domus* may have three meanings; first, it includes in its largest sense all those who are upon the boards, and who in academical language are termed *of the college*: Secondly, in a more limited sense, it may mean those who have been or are of the corporation; the *promoti*, as well as the actual fellows; or thirdly, it may be strictly confined to the actual existing fellows. That in this instance it must mean all those who are *of the college* is evident from the context of this statute, which in describing the mode of election directs that all the college shall go into the chapel, and all except the fellows return: if this explanatory statute be coupled with the ancient statute, or expounded by it, there can remain no doubt. There "*clericum*" was the only qualification in "*domo*". "*Hofel*" "*hall*" and "*college*" were the successive names of the places where the societies lived: "*hofel*" is clearly not a term of incorporation; neither is "*hall*". And the preamble to the old statutes "*domum seu aulam*" are the words instead of "*domum sive collegium*." It is extremely probable that the word *domus* should bear this signification in very old colleges, of which this is one; for formerly, before colleges were incorporated, the students lived in *hofel*, in *domo*. And Hugh de Balsbam, the founder of this college, had such a house for the reception of students before the college was founded. There are several instances in the statutes where a distinction is made between "*domus*" and "*societas*". In the 44th statute of the ancient code "*a loco suo et domo predictis sit privatus omnino*". In the 47th "*ab ipsa domo ejiciatur*." In 50th statute "*dictumve magistrum, aut scholares ipsius domus, seu quoscunque alios de eadem domo*." In the 10th modern statute "*locum in domo*". And in the sta-

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tute de scholaribus post admissionem eorum promotis, where it is said that if a fellow, possessing the property therein mentioned, *ibidem moretur*, he shall be said to be *perjurus*, it can only mean in case he does not resign his fellowship; for if he has, he may undoubtedly continue to reside *in domo*; so that *locus et domus* must mean fellowship and college. Another strong argument arises from the matriculation book to shew that *domus* must be understood in the more enlarged sense; because in that are set down the ranks of the different members, as they sit at the different tables, all of whom are described to be of the *domus*. And that mentions the fellows, noblemen, fellow commoners, the pensioners and the servitors. This is further corroborated by another circumstance of public notoriety; all persons, who vote at an university election, must belong to some college, although numbers of these are not upon the foundation. It cannot be objected that the founder could not have any other persons in his contemplation besides the fellows, because there are three statutes which expressly negative such an idea; the statute of appeal mentions *alios quoscunque de dictâ domo*; the statute *de prælectore* speaks of *bibliotistæ, scholares, et fixatores*; and in the very statute *de electione magistri, socii et discipuli cuncti* are mentioned: this undoubtedly includes persons in *Longmire's* situation. This exposition of the statute has likewise been put upon the statutes of other colleges, where even the master has been directed to be taken from among the *socios*; and it has been held in a variety of instances, that in academical language the word "*socii*" may include the *quondam socios*. The words of the statute of *Queen's College in Oxford*, are "*de fociis magis idoneum*;" and yet there are three instances in the present century in which the provost of that college has been taken from the *sociis promotis*. Upon the first of which elections in 1704, it appears by *Ayliffe's History of Oxford*, that the legality of the election was contested; but the determination of the visitor upon the construction of the statutes in favor of Dr. *Lancaster*, who had for some time resigned his fellowship, was never called in question in the courts of law. *Longmire* then coming within the description of a person of the college, he is entitled to a preference upon this return above any person to be taken from any other college. The real meaning of the statute of election will be better understood by comparing the construction which the college has put upon it with that given to it by the bishop of *Ely*. The college would render

1788.

The KING
against
The Bishop
of ELY.

1788.

The King
vs. The Bishop
 of ELY.

render it thus; "*ut ipsius domus atque sociorum ejusdem semper ratio habeatur; ut hi, (socii) si qui (socii) inter eos (socios) ad hoc munus obeundum inveniantur idonei, cæteris (universaliter sive de domo vel extra domum) præferantur: sin bujusmodi in domo nulli (socii) extiterint, tum aliunde (extra domum) assumantur.*"

The bishop of Ely has construed it thus; "*ut ipsius domus atque sociorum ejusdem semper ratio habeatur, ut hi (socii), si qui (socii) inter eos (socios) ad hoc munus obeundum inveniantur idonei, cæteris (de domo) præferantur: sin bujusmodi (secundum conditiones et qualitates antedictas) in domo nulli (sive socii, sive alii) extiterint, tum aliunde (extra domum) assumantur.*"

So that, according to the limited construction of the college, the words "*ipsius domus atque*" and the whole sentence from "*ut hi*" to "*præferantur*" are unnecessary: and if "*cæteris*" be understood in the extended sense, the latter clause also is nugatory. Whereas the bishop's construction gives effect to every part of the statute. This is not only the grammatical sense of the statute: but there is also the strongest probability for supposing it was the meaning of the framers of it. Upon the first clause *socii* and others *de domo* have equal claims: to give the preference to the actual *socii* a further clause was necessary; and in the next that preference is established, *ut hi (socii) cæteris (de domo) præferantur*. Then if none were properly qualified within the college, the election was to be made of strangers. Preference therefore was given in the first place to bachelors of divinity, being actual fellows, then to the bachelors of divinity of the college in general; and lastly strangers were to be elected. The words "*ut ratio habeatur*" must be considered as obligatory on the fellows, and not as directory only; that form of sentence being according to all the rules of grammar, clearly imperative. Such directions by founders have at all times been so considered by visitors. If it were otherwise, as the body of electors fluctuates, different opinions might be held upon the same statute. In the case of *Harland v. Trigg*, (a) The word *hoping* in a will with a determinate object was held by the Lord Chancellor to be sufficient to raise a trust. And it is enough for this purpose if "*ratio habeatur*" in this statute raises a trust; the fellows, who are the trustees, must execute it; and the visitor, or *fidei commissarius*, must enforce it's execution. In the statute "*de introducendis indigentibus*,

(a) Bro. Ch. Cas. 144.

"*in grammatica*" a recommendation to them to be diligent, that they may one day hope to be elected *perpetui socii*, has given an established preference in practice. This act of the college is decisive against themselves. But the direction in the statute of election is much stronger than the mere recommendation in the latter case; and the second class must be preferred above the third, if the first is to be preferred to the second. And there can be no doubt which of the two the legislators would prefer if they had it in their power to give an opinion, a person who had been forty years tutor and fellow of the college, or one who never had the smallest connection with it.

Perhaps it is an answer to this application to say, that in fact there is a master of *Peterhouse*: if that master has been improperly appointed, he should be removed before the bishop is compelled to appoint another; like the cases of corporate offices, *The King v. The Mayor of Colchester*, ante 259. For *Longmire* being actually in possession under the bishop's appointment will not be concluded by this determination.

Mansfield and *Erskine* in support of the rule. Three principal objections have been made against this *mandamus* being granted. 1st. That the person to whom it is directed, and whose consent is necessary towards giving effect to the election made by the fellows, is visitor of the college, which is urged as a sufficient reason why this court should not exercise its ordinary authority. 2dly. That the bishop is not necessarily bound to appoint one of the two persons returned to him, but may exercise his own discretion as to the propriety of their choice. It is thirdly objected to the election that the fellows neglected to return *Longmire*, whose situation in this college entitled him to a preference before *Barnes*, who was an entire stranger thereto.

As to the first objection, it is denied that the bishop in this instance either was or claimed at the time to be visitor. In the statutes which relate to the election of a master, there is no reference whatever to the visitor's authority. And every power which is given by them to the bishop, when the see is full, is given in as ample a manner to the guardian of the spiritualties in the vacancy of the see, and this latter is clearly not visitor. The statutes have described very accurately the qualifications for the mastership, and the mode to be preserved in the election. The statute *de electione magistri*, after stating the manner in which the election shall be conducted, requires a return to be made by letters under their seal,

1788.

The King
against
The Bishop
of Ely.

1788.

The KING
against
The Bishop
of ELY.

seal of two persons, whom the majority of the fellows shall think most fit for the office of master, to the bishop or guardian, (as the case may be) who is thereby required to give *plenam fidem* thereto; and it also enjoins him to appoint one of the two persons so returned without delay. And then it provides that if the fellows do not agree within a limited time upon whom they shall return, they shall be sent to a second, and so on to a third, scrutiny; and if they still disagree, then, and not till then, the bishop or guardian shall appoint a master. So that the respective duties of the fellows and the bishop are expressly pointed out, with this difference only, that the fellows are bound by a solemn oath, which the bishop is not. From this statute it appears, that there is but one event in which the bishop may appoint whom he pleases, which is that of there being no return at all made to him; and he cannot acquire any power which is not given him by the statute: and even though the election were to be null, it would not necessarily follow that the bishop would have the power of appointing. He has no power of appointment but under the statute, and that only in one event which has not happened in this instance; and he might as well claim to present to the vacant livings of the college, and then say that this court is not to interfere, because he acted as visitor, and has so interpreted the statutes. It is very properly admitted that the guardian of the spiritualties has no power to appoint the master except in the case specified; but it is said that the bishop has an additional power incidental to his office of general visitor, by which he may expound the statutes; and that according to his exposition of them, he had that right which he contends for in the present instance. But such a power in a visitor of putting his own interpretation upon the statutes must be taken *secundum subjectam materiam*; and the statutes having in this case expressly required him to give *plenam fidem* to the return made by the fellows, he is not at liberty to controvert the propriety of it. As to all the cases respecting the extent of visitatorial power, and all the consequences drawn from them, they are not disputed. His power is not controllable where he acts within his jurisdiction. It has been said too that a visitor has power to judge of elections, that he may interpret the statutes, and that his decisions cannot be enquired into in a court of law: it is also said that he is to judge of the extent of his own jurisdiction, and that he may make new laws. As to the three first, they are not disputed where a
visitor

visitor acts within his jurisdiction, as in the case of the bishop of *Chester* (a), where a visitor deprived; or where new fellowships were engrafted (b): but in all these cases the rights and conduct of other parties are in question; but when the dispute is between the college and the visitor himself, concerning the rights bestowed upon either, the cognizance of the question necessarily devolves upon the king's courts, for a visitor cannot give to himself, as is contended, by his own interpretation, a more extensive jurisdiction than the statutes have conferred upon him. In cases of this sort the visitor insists upon his title, but that must be a title by law, and not, as has been contended on the other side, a title by discretion and arbitrary will. If a visitor had always a right to decide upon the extent of his own jurisdiction, the cases of prohibitions to visitors could never have existed: yet many such are to be found; and no public inconveniences have hitherto resulted from such determinations, or the discipline of the universities been invaded. As to the last position that a visitor may by his sole authority make new laws, it is very much to be doubted. These statutes are expressly said to have been given upon the request of the college. It may be questioned how far a founder himself, after he has once given a code of laws, by which certain rights are conferred on others, can of his own authority abrogate them. By these statutes a power is given to the master and fellows to make new regulations as new cases shall arise. But even admitting that the visitor of this college could give new statutes; yet so long as those by which the college is now governed continue in force, he must be bound by them. And here it is sufficient to say, that the visitor has not made any new laws. If there is any weight therefore in the argument, it must go the whole length of shewing, that by acting contrary to the laws the visitor abrogates them, and makes a new law consonant to his own conduct. It is indeed the duty of a visitor to superintend the government of his college, and to see that all the members of it do their duty. But if he were a judge in this case, of what is he to judge, but whether he himself has the sole and exclusive appointment to the mastership of this college: for the argument, if it prove any thing, goes the whole length of establishing that even if the fellows had, in the judgment of this court, elected two proper persons, the bishop as visitor might decide otherwise, refuse their return, and nomi-

1788.

The KING
against
The Bishop
of ELY.

(a) 1 Bl. Rep. 22.

(b) 1 Bl. Rep. 71.

1788:

The KING
against
The Bishop
of Ely.

nate one himself, which would be in effect to annul all the statutes respecting the election of master, although they have expressly restrained the visitor from interfering, except in one event. Neither can it be said that the bishop was acting as visitor upon this occasion, upon an appeal from *Longmire*, for there was no appeal before him; he acted solely on the representation of *Longmire*, without giving any notice to the rest of the persons who were concerned: and besides, according to the arguments used by the bishop's counsel, the bishop, as visitor, had a right to appoint any body else as well as *Longmire*. It must be admitted that it is no objection to a visitor's exercising his ordinary authority that he has an interest, and the case of *Manchester college* (a) goes upon a different ground; but then in this case, according to our construction of the statutes, the bishop is not visitor. It appears too from the very conduct of the bishop of *Ely* himself in this case, that he did not consider himself acting as visitor in this appointment, but as appointing by lapse. In his letter to the college he says, that their election was null and void, because one of the persons whom they had returned to him was not a proper person according to the intention of the statutes, for which reason he should proceed to exercise this devolved authority for this turn by the appointment of Mr. *Longmire*. This expression is not applicable to the absolute power of visitor which is now claimed, but it expressly refers to an appointment by lapse. This was followed up by an instrument using the same sort of language; "belonging to our donation and collation in consequence of the right reserved to us by the statutes of the said house." Then after appointing *Longmire*, he directs the college to receive him. If he had been exercising a visitatorial power, he would only have said that the election made by the fellows was void, and therefore he appointed. His own conduct therefore shews that he only acted as ordinary in the common case of a lapse. But neither had the bishop a right of appointing by lapse. For why should the statutes appoint a certain case, in which there should be a lapse, if in any other case the bishop might take the appointment into his own hands? If he may assume to himself the right of appointment in the present instance, he might equally have done so where he took no part in the appointment. But supposing the power of electing a master to have been solely in the fellows, the

(a) 2 Sira. 797.

bishop,

bishop, as visitor, could not have appointed at all. From thence it follows that if he has a part only of that appointment expressly given him, he can take no more than that part. With respect to the instances which have been produced from the register in this college of appointments made by the bishops of Ely under similar circumstances, it appears that there is no one instance in which the bishop has not taken one of the two persons returned to him by the fellows, except that of bishop *Wren* in 1663, who appointed his own son-in-law; and the reasons assigned for setting aside the return made by the fellows are all false or grossly absurd: the acquiescence of the college therefore can only be attributed to the times. And it is observable that even bishop *Wren* claimed the appointment by lapse, and not as visitor.

2dly, It is objected, that the bishop is not bound by the return made by the fellows, but that he may exercise his own discretion upon the propriety of their choice. On this head it will clearly appear, upon an accurate inspection of the statutes, that he is absolutely concluded by the return of the two persons which they have made. In the old statute *de nominatione et praelectione praefecti domus*, the fellows are required to return two whom *suo judicio noverint discretos*; and there are other words to the same effect, clearly giving them the fullest latitude to judge of the qualities of the master. And in the statute *de impediendis numerum scholarium augmentari*, where a master is removed, the fellows *liberè provideant de magistro*; which must intend a free choice, not subject to any control. Again, in the statute *de praelectione et qualitate magistri*, the bishop is required to give *plenam fidem* to the return made to him by the fellows; which words plainly express that it was intended that the bishop should be bound by their return. It has been attempted to explain this expression away, by saying that the bishop is only required to give faith *primâ facie* to the return; but the words necessarily import the direct contrary; and it is further corroborated by the words which follow immediately after, for the bishop is there required to appoint one of the two *sine morâ*; which could not be, if it were his duty to enquire whether the two persons presented to him were the most proper who could have been selected. Nor is it to be wondered at that such credit is required to be given to the act of the fellows, since they are so materially interested in the choice of the person by whom

1788.

The King
against
The Bishop
of Ely.

1788.

The KING
against
The Bishop
of ELY.

they are to be governed; and every possible guard has been put upon the due exercise of that right by the fellows, there being a solemn oath imposed upon them on that occasion. There cannot be two rights repugnant to each other. If the fellows have a discretion, the bishop cannot have a right to control it. But according to this construction, the rights of the two parties are consistent: the fellows exercise their judgment in selecting the two whom they are required to present to the bishop; he, on the other hand, exercises his discretion which of the two he will appoint, *quem majis utilem de duobus intellexerit*. If the court adopt a contrary construction, this absurdity will follow, that supposing there should be two fellows in the college duly qualified in point of degree, but who, in the judgment of the electors, are not fit persons, they will be obliged to return those two, in direct violation of their oaths. The question therefore of fitness must necessarily rest with the fellows; it is a matter of opinion, and cannot be tried. A person, however proper in other respects, may want aptitude for business, or firmness of mind, which may be very good grounds for not electing him. The bishop has no more control given him in this respect, than the guardian of the spiritualities. If the fellows do not think there are proper persons in the college, they are at liberty to go *aliunde*, and they shall be presumed in all cases to have exercised a sound discretion; and therefore the bishop is not at liberty to object to them, that they ought to have elected any particular person. The arguments by analogy to the election of fellows rather apply in favour of the college; for in such cases, if the fellows do not choose such as are qualified in the manner there specified, it is expressly declared that the election shall be void. Now, if the same thing had been intended by the framers of the statutes in the case of the mastership, they would have used the same language; but in this latter case the bishop is only to appoint in case the fellows do not agree after the third scrutiny.

But 3dly, It will appear that *Longmire* was not entitled to any preference as a member of the college within the meaning of the statutes. The material words in the statute *de præfessione et qualitate magistri* are, "*ut ipsius domus atque faciorum ejusdem semper ratio habeatur, ut hi, si qui inter eos ad hoc munus obendum inveniantur idonei, cæteris præferantur, sin hujusmodi in domo nulli extiterint, tum aliunde assumantur.*" Now in the construction

struction of these words, *hi* can only relate to *socii*, and *cæteris* can only mean the rest of the fellows, who are not *idonei*: *hi* cannot relate to *domus*; if *domus* had followed *sociorum*, it might have enlarged the sense of it, but standing as it does, if it were held to enlarge the sense of it, this absurdity would follow, that mention would be made of a part which was before included in the general term. It must therefore be taken to be restrictive; and indeed the grammatical construction shews that reference was made to *socii* alone. But under the word *domus* it is contended are meant to be expressed all persons who reside within the house, and have their names on the boards: but this is a most improbable meaning to affix to the word, such as is not in common parlance annexed to it, and which clearly appears in this case not to be the proper one. *Domus* and *collegium* certainly mean the same thing; they are repeatedly used as synonymous terms. That appears from the preamble to these very statutes, *construxit quandam domum sive collegium*. Either *domus* means here the corporation, or the mere walls of the house: but it must be taken in these statutes to mean the former; for it could never have been necessary to ask the king's consent to build a house, though it certainly was to erect a corporation. Where the statute *de nominatione et præfectione præfecti domus* requires obedience to be paid to the commands of the master by the members of the college, it only speaks of the *scholares et ministri*. Again, the expression of *facultates domus*, in another place, must mean the revenues of the college or foundation, and not of the walls. So in another place, any fellow who takes any preferment is to be *privatus à loco et domo*; which shews that he is no longer to be considered as belonging to the *domus*, that is, to the corporation. This peculiarly applies to the situation of Longmire, who about twelve years ago took a living, and was therefore removed *à loco et domo*. But it is said that by keeping his name on the boards he still continued a member of the *domus*: but so much a stranger is such a person considered to the foundation, that it has been determined that he is not under the jurisdiction of the visitor; and if expelled by the college, he has no right to appeal to him. This was fully settled in the case of the *King v. Grondon* (a), and in *Davison's* case in chancery 1772 (b). No such persons as these are mentioned in any of the statutes. Then it was said that at any rate the meaning of *domus* must be extended beyond the fellows, because it included

1788.

The KING
against
The Bishop
of ELY.

(a) *Corup.* 315.(b) Cited in *Corup.* 319.

1788.

The King
against
The Bishop
of Ely.

the *Bibliotists*, who were clearly members of the *domus* or college. But they were not known till a very long time after the foundation and settlement of the college about 1489. Besides, it could never have been intended that the bibliotists should be elected to the mastership, for their employment is at first to read the bible, and attend the master and fellows, and afterwards, if they are thought fit, they may be chosen fellows. Lastly, It has been argued on this head, that *Longmire*, being an acknowledged member of the university, must therefore necessarily be a member of some college, and if so that this court ought to adopt the university construction of the word *domus*. But as to the rights which attach upon persons in respect of their degrees in the university at large, they depend upon a particular grace passed for that purpose; and therefore no light can thereby be thrown upon this subject.

Then as to the remedy by mandamus in this case, it has been suggested to be an improper one; for *Longmire* being actually in possession of the mastership, he should first be removed from it by due process of law, as in cases where an office in a corporation is in fact filled up. But in such cases where the election or appointment is only colourable, the court have granted a mandamus, as in *Rex v. Tintagel* (a). An information in the nature of a *quo warranto* would not lie in the present case. *R. v. Gregory* (b). Neither could an ejectment be brought here, because no person could make the demise. A mandamus therefore is the proper remedy.

Law and *Gibbs* were to have argued on the same side; but the court, having no doubt upon the question, stopped them.

ASHHURST, J.—This is an application for a mandamus to the bishop of *Ely* to appoint one of two persons, whom the fellows have nominated, and elected, to the office of master of *Peterhouse* in *Cambridge*. It appears by the affidavits that a vacancy happened by the death of the late master, and that the fellows proceeded to an election; that at that time there was only one fellow of the college, Mr. *Borlase*, who was duly qualified by the statutes, whom they returned to the bishop, together with another person, Mr. *Barnes*, who was a member of another college: it also appears that Mr. *Longmire*, who had formerly been a fellow of *Peterhouse*, but had for some time before ceased to be such, still kept his name on the college boards. This nomination so made by the fellows the bishop has rejected,

(a) 2 Str. 1003. (b) *Eas. 12 Geo. 3. B. R.*

and has appointed Mr. *Longmire*, either under the idea of his general visitatorial authority, or of a lapse in consequence of the fellows not having made a proper nomination. And the question is, whether Mr. *Longmire* ought to have been preferred to a person who is a member of another college. Two objections have been made on the part of the bishop to our granting this application; first, that this court has no jurisdiction upon this subject, the bishop having acted as visitor, whose decisions are final; and, secondly, that, admitting his determination not to be conclusive, he has put the right construction upon the statutes; if so, whether he has acted under his visitatorial authority or not, the court ought not to grant a mandamus. The proper questions therefore for our determination are, first, Whether this was a proper object of the bishop's visitatorial authority? Secondly, Whether he has acted in this instance as visitor? And, thirdly, Whether the interpretation which the college have put upon these statutes is the true one?

First, It does appear to me that this is not a case within the bishop's visitatorial power; since the statutes of the college have restrained him from making use of that power in the present instance. I admit that in every case within a visitor's power, and where he sits in the exercise of that power, his acts are not to be questioned in courts of law. The founder has thought fit by the statutes to invest the bishop of *Ely* with general visitatorial power, but he had a right to restrain him in certain cases if he thought proper; and as to those objects the bishop is not visitor. Then it is material to consider whether under the statutes this is not a case of that kind. I confess I am of opinion that, on the true construction of the statute *de electione magistri*, the power of the bishop is limited and restrained. In this instance the bishop cannot interfere as visitor; the only power which he can exercise is to judge of the fitness of the two persons nominated by the fellows. The words of this statute, after prescribing the previous forms of elections, are, "*Quo demum facto volumus*" "*item, ac statuimus, ut eosdem duos absque ullâ juris solemnitate*" "*aut longiori expectatione domino Eliensi episcopo, qui pro tempore fuerit, dictæ domus patrono, sede plenâ, vel eâ vacante*" "*custodi spiritualitatis episcopatus Eliensis, nominent et præsentent suis literis sigillo communi domus in testimonium et sigillatis,*" "*quibus intra scriptis adhiberi volumus plenam fidem; episcopusque Eliensis sede plenâ, vel eâ vacante custos spiritualitatis*"

1788.

The KING
against
The Bishop
of ELY.

1788.

The KING
against
The Bishop
of ELY.

*“prædictus, unum de duobus hisce nominatis & præsentatis quem
“magis utilem intellexerit dictis domui & scholaribus præficiat
“absque morâ in magistrum, ne domui et scholaribus dispendium
“aliquod inferat longa mora.”* The intention of the persons who gave this statute evidently appears from this to have been that the fellows should judge of the fitness of the respective candidates, they being supposed to be more conversant with their qualities than the bishop who resided at a distance; and for that reason it might be proper to repose such a confidence in them. And every precaution has been taken that the fellows shall not elect any but those who are proper, by obliging them to take a solemn oath not to nominate any person out of favor or affection. The legislator, having intended to give that power to the fellows, has by this statute expressly excluded the bishop from interfering in their choice. He is required to give full faith and credence to the propriety of their nomination; so that he is only to act ministerially, at most he has only a discretion left him as to which of the two he will prefer; beyond that he is restrained by the statute. If this be the true construction of the statute, the right of nomination was no object of the bishop's visitatorial power; therefore our opinion in this case does not militate against any of the cases cited at the bar. Those cases shew that the acts of a visitor, whether right or wrong, are not to be examined in the courts of law; but those are cases where he has acted within his jurisdiction, and they proceed upon this principle that he is the judge whom the founder has thought proper to appoint. There is still a farther reason to think that the bishop of *Ely* has no visitatorial authority in this instance, because the same powers are given indiscriminately to the bishop, or in the case of the see being vacant to the guardian of the spiritualties; and it is clear that the guardian of the spiritualties is not a visitor.

But even supposing that this matter was within the bishop's visitatorial authority, yet he has not acted in the character of visitor. The exercise of a visitor's power in a case like the present is a judicial act; and a judge cannot determine without hearing the parties concerned. So that even if he had the right to exercise such a power, he should have done it in a formal manner, and should at least have convened the parties interested to give them an opportunity of making a defence.

The next question is, whether there is any thing in the proceedings of the fellows to prevent the court from granting the *mandamus*. This being an application to the discretion of the court,

court, if we saw that either of the two persons returned by the fellows was manifestly improper, we would not interfere. Then it is necessary to consider whether, under the construction of the statutes of the college, they are proper objects or not. I do not think that the fellows have been wrong in their construction of them. The words of the statute *de præfectione et qualitate magistri* are, “*in cujus vero electione hoc imprimis observari volumus, ut ipsius domus atque sociorum ejusdem semper ratio habeatur; ut hi, si qui inter eos ad hoc munus obeundum inveniantur idonei, cæteris præferantur; sin bujusmodi in domo nulli extiterint, tum aliunde assumantur.*” It would be very extraordinary, if by the word “*domus*” the whole body was meant, that the statute should afterwards proceed to mention the “*socii*”, who are the corporate and principal part of the college, in a secondary view. It would have been more natural to have taken the capital members first. Therefore if “*sociorum*” was not meant as synonymous with “*domus*,” I construe the latter word as restrictive of the generality of the former word “*domus*”, explaining in what sense it was intended to be used. Nor is this unlikely to have been the intention of the legislator; for probably at that time he had no idea that persons, who had ceased to be actual members of the college, would continue to keep their names on the college boards for any other purposes. Considering this question therefore in every point of view, I am of opinion that the rule for the *mandamus* should be made absolute.

BULLER, J.—That the bishop of *Ely* is the general visitor of *Peterhouse* is clear; and it is equally clear that this court has no jurisdiction to enquire into acts done by a visitor as such. I have never been inclined to assume a jurisdiction on any subject which I have not found to have been previously exercised by the court, particularly in questions between members of the colleges of the universities. In such cases my inclination is against the jurisdiction of the court, unless I am compelled by legal authorities to support it. The first point to be considered in this case is, whether the act done by the bishop, and which is the subject of the present complaint, was or was not a visitatorial act. Secondly, if it were not, whether it can now be inquired into and redressed by him as visitor supposing it to be wrong. As to the first point; I think there is not the smallest pretence or foundation for saying that the bishop appointed Mr. *Longmire* in his capacity of visitor. The very form of appointment decides that

1788.

The KING
against
The Bishop
of ELY.

1788.

The KING
against
The Bishop
of ELY.

that it was made in *pleno jure*. In it he asserts a right vested in him by the statutes by reason of the nullity of the election and proceedings of the fellows in not presenting two persons qualified. His proceedings therefore have not even the shew of a visitation; for whenever that is intended, the parties whose conduct or whose rights are objected to should be heard or at least convened before him, and have an opportunity of being heard: but in the present instance this ceremony was totally omitted. In a late case of *The King against The Bishop of Lincoln*, where an application was made to him as visitor, the Court said they would grant a *mandamus* to compel him to hear (a). A visitor is certainly not bound to proceed according to the rules of the common law; but unless there be a general visitation of the college, there should be an appeal, and he should proceed on that. The mode of proceeding on a visitation of the college will not apply to this case. Besides I am of opinion that in cases where the right of appointment devolves on the bishop on the neglect of the fellows, he has not that right *as visitor*, but *under the express appointment of the founder*. The founder may control the visitor from interfering in any other case: and it is observable that where the fellows do not return two persons, the statutes have given the right of appointment to the bishop, if the see be full, but if not, to the *custos spiritualium*, which is a right very different from that of a visitor: if the see were vacant the *custos spiritualium* could not visit, but yet would be entitled to this appointment. Secondly, As this was not a visitatorial act, it is impossible that the propriety of the bishop's conduct can be enquired into by him as visitor, for this would be to determine upon his own right. This point is so clear, that if there were no authority on the subject, I should not have hesitated to make the first determination upon it. A visitor cannot be a judge in his own cause, unless that power be expressly given him. A founder indeed may make him so, but such an authority is not to be implied; he cannot visit himself. In the present instance

(a) In the case of *The King v. The Bishop of Lincoln*, where a *mandamus* was prayed to the bishop as visitor of *Lincoln College, Oxford*, to compel him to receive, hear, and determine, an appeal of Dr. *Halifax*, who complained of an undue election to the office of rector of that college, to which Mr. *Horner* had been admitted, the court determined that

where by the statutes of a college a visitor is appointed, who is to interpret the statutes, and an appeal is lodged with him, the court will compel him to hear the parties, and form some judgment, though they will not oblige him to go into the merits; for it is sufficient, if he decide that the appeal comes too late. *Trin. 25 Geo. 3.*

the bishop of *Ely* claimed an interest, and asserted a right, in the appointment of the master; and that appointment is the act complained of. The case of *The King v. The bishop of Chester* (a) is a strong authority on this point: it does not indeed go the whole length of this case; but the principle of it is, that the same person cannot be the visitor and the visited. It was thrown out in argument that that case was not approved of in *Westminster Hall* at the time it was decided: for my own part I have no reason to disapprove of it; and it has been recognized by Lord *Hardwicke* (b), and sanctified by the legislature (c). The consequence of this is, that the power of deciding the present contest on the construction of these statutes devolves on this court; and the application for the *mandamus* is right, provided the prosecutor has supported the grounds on which it is founded to the satisfaction of the court.

This leads to the enquiry whether the fellows have done right on the present occasion. In the course of the argument upon the merits much has been said on the meaning of the word "*domus*". Therefore it is material to consider in what sense it is used in the statutes which have been given to this college; but I do not think that the case wholly depends upon that. The statutes which have been read, however originally given, are those by which the college is undoubtedly governed. *Domus* is a very extensive word, and has different significations according to the subject matter to which it is applied. In order therefore to understand the true meaning of it in this case, we must consider the subject matter concerning which it is used; and enquire what was the intention of the person who used it. In ancient times a bishop of *Ely*, with a very laudable and pious design, resolved to found a college. He founded it by the name of *domus sive collegium*, and directed it to be called *domum sancti Petri seu collegium scholarium episcopi Eliensis*; and he says that he did it in order to advance poor scholars in literature. When a man founds a college, and in the instrument of foundation itself speaks of the college, what can he mean but that college founded by himself: here it is expressly called by the bishop, who founded it, the college of the scholars. They were the objects of his bounty; and the college founded by him consisted only of a master and a certain number of scholars, to be enlarged hereafter if the revenues which he gave to the college would

1788.

The King
against
The Bishop
of Ely.

(a) 2 *Stra.* 797.(b) 1 *Vez.* 471.(c) 2 *Geo.* 2. c. 29.

1788.

The KING
against
The Bishop
of ELY.

permit it. Those were the persons of whom the *domus* was to consist. The scholars are his adopted children; they eat of his bread, and are supported by his substance. But the independant members stand much in the light that a woman would consider a child of her husband by a former wife, when put in competition with her own: they are strangers to the foundation. There are a variety of instances in the course of the statutes, in which the word *domus* is used as synonymous to "the society," and only means the master and scholars; and in different places the words *nostra domus scholarium* are used. So in the statute "*De numero scholarium*".—In the statute "*De scholaribus qui se ad obsequia transferunt extra domum*" there is an expression which shews that no distinction is made between the place which the scholar had in the house, and the house itself, when he is deprived; for the words are "*a loco suo et domo prædictis sit eo ipso privatus omnino*." If this be the true sense and meaning of the word "*domus*", as used in general in the statutes, it will require very strong arguments to shew that it ought to receive a different construction in this statute, entitled *de præfessione et qualitate magistri*. I will first state what I conceive to be the substance, sense, and meaning, of the statute; and then I will proceed to examine more minutely whether the construction which I put upon it be warranted by the words or not. First, I say the substance, sense, and meaning, of it is, that, in the election of a master, regard shall always be had to the scholars, so that if there be any among them who are qualified, they shall be preferred to all others: but if there be none such among the scholars, then the two to be returned to the bishop shall be taken from among other persons. Then is this construction warranted by the words of the statute? The objections to it are three; 1st, That the words "*ipsius domus*" must then be mere surplusage, and have no meaning. 2dly, That there are three classes of persons, intended as the objects of the founder's bounty in succession, namely, the scholars of the college, the independant members of it, and the members of other colleges, giving to each of the two first a preference in the order in which they stand. And 3dly, That there are other words in this statute which will entirely exclude the independent members of this college, if they are not allowed to be a separate, and the second, class of persons capable of being elected. These objections perhaps might well be reduced to two, but I shall consider them as three

three distinct objections, in order to give the answers more clearly to each of them. As to the first, I hold that the words "*ipsius domus*" are mere surplusage: but if they are not so, both requisites must be complied with; and the first must be considered as qualified and restrained by the latter according to the construction which my brother *Ashurst* has put upon them. It is not to be wondered at that there should be a redundancy of expression in these statutes; whoever reads the parade of eloquence which is to be found in the exordium, or introductory part of these statutes, will be led to expect even more verbosity than the statutes themselves afford. But it is extremely clear that neither in this or in any other part of the statutes is the word "*domus*" used as signifying the house or building. Throughout the statutes it means the *persons of the college*, and for the reasons which I have already given, I think it means only those who are the *members of the foundation*. It has been said that the founder must have had other persons in his contemplation besides the members of the foundation, though it is admitted that his object was only to provide for those particular persons. If his object were only to provide for those particular persons, it would go a great way to decide this question. But I agree that he had other persons in his contemplation: but those were not the independent members of the college; they were the enlarged number of the scholars, which the founder hoped would be added to the college as the revenues increased. Nothing appears to shew a predilection in favor of any others. The words "*domus atque sociorum*" being coupled together in this statute convince me that only those were meant who are members of the foundation, who subsist on the founder's bounty, and that it is nothing more than a redundancy of expression. But as I shall have occasion to observe more on these words in considering the second objection, I will proceed to that, which is that there are three classes of persons, who are successively intended to be preferred; and they are said to be, 1st, The scholars; 2dly, the independent members of the college; and 3dly, Persons of other colleges properly qualified: now taking it to be clear that *domus* means persons of some description, let us see how the words must be read according to the defendants construction. It will be that in the election of a master, regard is to be had to the members of the college, and to the scholars of the same; so that they, if any be found amongst them fitting, &c. *cæteris præ-*

1788.

The KING
against
The Bishop
of ELY.

1788.

The KING
against
The Bishop
of ELY.

præferantur. But I deny that an independent member is a member of the college within the meaning of the statute; for if he were, it would be to say that the independent members, should be provided for in the same degree as the dependent members, since according to that construction no distinction is made between those who are scholars, and those who are not so: and yet it is admitted that those who are fellows were meant to be preferred to those who are not. This therefore cannot be the true meaning of the statute. But 3dly, other arguments have been drawn from some particular words which follow in this clause; and it is objected that such a construction will entirely exclude the independent members of the college, unless they are allowed to be a distinct and separate class. The particular words relied and commented upon are “*ut hi, si qui inter eos, &c. cæteris præferantur; fin hujusmodi in domo nulli extiterint, tum aliunde assumantur*.” But all the ingenious arguments drawn from these expressions are answered by the meaning of the word *domus*; for if *domus* means the members of the college “the words *qui inter eos*” necessarily refer to those who were before mentioned, namely, *among the fellows or scholars*, according to the construction I put upon the statute, or among the members of the college at large, according to the construction which the defendant’s counsel have put on it. But *quæcunque viâ datâ* they must refer to *domus* as well as *sociorum*; and whether *cæteris* in its true sense may mean *the rest* only, or *others*, is a nicety which does not merit much attention: but here from the context it must mean *others*. But if none are found in the *society* or of the *foundation*, then two are to be taken *aliunde*, that is, *elsewhere*, or out of other persons, which comprehends all persons except the *scholars*, out of whom the choice is first to be made, if there be any who are qualified.

Thus stands the case on the merits as they have been argued on the part of the defendant; and even if it rested here, I am of opinion, that the *mandamus* ought to be granted; but there are other parts of this case which would require very mature consideration before this application is refused. First, I hold that the bishop has no right to appoint in this instance *as visitor*; his authority arises under an express designation in the statutes, and he must take it as it is there given to him. But on the construction of these statutes it is wholly immaterial to consider whether he is visitor or not; for a power to appoint is only given

to him by the statutes, in case the fellows do not agree upon two to be returned to him upon the third scrutiny; and if the see be vacant at the time of their default, then it is given to the guardian of the spiritualties. Upon the words of this statute it seems to be extremely clear that the bishop has no right, unless default is made by the scholars in not making a return to him. It was to the scholars that the statute meant to give the effective disposition of the office of master in a qualified way. They are first to name two, who ought to be the two the most fit whom they can find; and if they make that choice as they ought to do, which-ever the bishop may prefer, they will be sure to have a master agreeable to themselves, and equal to the duties of the office which he is to fill. If the fellows do not return two persons as well qualified as they can find, they abuse their trust, and they mislead the bishop; for he has a right to a free choice which of the two he will take; and let him take which he will, the fellows are bound to receive and be satisfied with him. But every precaution has been taken to secure their duty by requiring them to take a solemn oath; the rights and qualifications of the persons to be returned are expressly pointed out by the statutes; and it may be a considerable question, whether the consideration of those qualities does not rest wholly on the judgment and conscience of the scholars. I say it is a considerable question, and I do not mean to give any positive decided opinion upon that point now, because it is unnecessary in this case. And I hope that such a good understanding will always prevail between the bishop and the fellows, as will make it unnecessary to apply to this court for an opinion upon that subject; it is their mutual interest and their duty that it should be so.

GROSE, J.—As this case has been discussed so fully on the bench, it is not necessary for me to add much, as I agree in opinion with my brothers. I will, however, state generally the grounds of my opinion. Three questions have been made in this case; 1st. Whether the two persons returned by the fellows to the bishop of *Ely* have been properly nominated? 2dly. Whether the bishop was bound to appoint one of them to be master? And 3dly. if he were, whether a *mandamus* ought to be granted? The first depends on the construction of the word "*domus*." The objection which the bishop has made to the return by the fellows is that "*domus*" means all the persons *within the walls* of the college, namely, all those who in the common ac-

1788.

The KING
against
The Bishop
of ELY.

1788.

The KING
against
The Bishop
of ELY.

ception of the word are said to be of the college. On the contrary it has been argued that *domus*, according to the true construction of the statutes, means the incorporated society in the college. *Domus* may have a variety of significations, according to the subject matter; it may mean the walls of the college; or those who live within the walls; or only that society which is incorporated. There cannot be much doubt, I think, but that, in the manner in which it is used in these statutes, it means only those who were incorporated by leave of the crown. This is an eleemosynary foundation, and founded by leave of the crown; and the founder could only mean to provide for those incorporated by him. For when *Simon de Montacute*, who was bishop of *Ely*, is relating what *Hugo de Balsam* had done, he says, he was desirous of providing for poor persons, and that he *construxit domum five collegium*. Now the *domus* here spoken of can only mean the corporation created by leave of the crown; for it was not necessary to ask the leave of the crown to build the walls of the college. The recital then proceeds, “*quam vel quod domum five collegium scholarium voluit nuncupari, et eam dotavit;*” that can only apply to the foundation, for he gave nothing to any body but the society. Then is described who are meant by the “*domus*,” namely, “*Magistrum et tot scholares, &c.*” Then it is considered how many *scholarium* can be provided for, “*quod facultates ejusdem domus vix sufficerent pro sustentatione quindecim personarum.*” This shews to a demonstration that the *domus* was then to consist of fifteen persons, namely, the master and fourteen scholars, the *scholares perpetui*. Then rules are given for the government of the *domus*, that is, for the society so incorporated. This construction is strongly corroborated by the statute *de nominatione et præfectione præfecti domus*; for there all the persons are enumerated of whom the *domus* is to consist: the master is appointed to preside over the *scholares et ministros*, who are there considered as making up the *domum*; and no persons are there considered as part of the *domus* but those who were of the foundation. Mr. *Longmire* therefore, though he was an independent member of the society, cannot be considered to belong to the *domus*, so as that the fellows were bound to return him to the bishop in preference to Mr. *Barnes*, who belonged to another society.

The next question is, whether, under the other statutes of the college, the bishop was bound to appoint one of the two persons whom

whom the fellows had returned to him. Twelve days are allowed to the fellows to consider whom they will return to the bishop; they are bound by an oath to return those two who shall appear to them most fit; the choice therefore is given to them; these two are to be presented to the bishop, or, in the vacancy of the see, to the guardian of the spiritualties, who is to appoint one of the two *sine mora*. If the bishop is immediately to name one *without delay*, the statutes must mean that it should be compulsory on him to appoint one of those two; otherwise they are nugatory. No language can be stronger: and it would be absurd to say that the fellows should take twelve days to consider of the most proper persons to be returned, and, notwithstanding that, that the bishop should immediately annul their proceedings. In this instance the bishop of *Ely* has not appointed one of the two persons nominated by the fellows; but has named another person. What my brother *Buller* has said on this head is decisive: there is a case pointed out by the statutes in which the bishop has the right of nomination, namely, in case the fellows do not agree on a third meeting: then the statutes mean that that should be the only case in which he should appoint. If so, the bishop of *Ely* has done wrong in appointing Mr. *Longmire*.

Then, is this a case in which a *mandamus* ought to be granted? It is objected that a *mandamus* ought not to go to a visitor. I have often considered the serious consequences which would follow from granting a *mandamus* to a visitor. This court will not interfere in such cases: but those are only cases where he is clearly acting under a visitatorial authority. But here the bishop of *Ely* was not acting as visitor; he could not act in that character. Neither did he himself conceive that he was acting as visitor; his acts shew that he was not; and he acted without giving notice to the persons on whom he was judging. Then if he had no power in this case to act as visitor, nor thought at the time that he was acting as such, our determination will not interfere with any of the cases which have been cited. No bad consequences can be apprehended from our granting this *mandamus*; and, by granting it, we shall do that which has been the constant aim of this court in granting a *mandamus*, namely, prevent injustice.

Rule absolute.

1788.

The KING
against
The Bishop
of ELY.

1788.

PHILIPS *against* BURY.

In Skinner's Reports Lord Holt's opinion is given almost verbatim as here: & it seems to me, that both accounts were equally taken from Lord Holt's Mss.

WE have been favoured with the following note of my lord Holt's argument in delivering his judgment in this case, taken from his own manuscript, and which was mentioned in the argument of *The King v. The bishop of Ely*.

HOLT, Ch. J.—I will put the case (a) as short as I can upon the record, and it is thus. *Exeter college in Oxford* was founded by *William Stapleton*, to consist of a rector and scholars. By the statutes and constitution of the college the bishop of *Exeter* for the time being is appointed visitor, to visit by himself or commissary; and the time is set when he shall visit at the request of the college, as often as they think requisite, and, without such request, once in five years *ex officio*. Then it is directed that in his visitation he may proceed to the deprivation of the rector, or to the expulsion of the scholars. Then there is a qualification of this power by the particular words of the statute; "*Si tamen ad deprivationem rectoris aut expulsionem scholaris alicujus per episcopum aut ejus commissarium agatur*," then his crimes shall be shewn unto him, and if he cannot probably make out his innocence, then he shall be amoved, without further appeal; *dum tamen ad ejus expulsionem*, there shall be the consent of the rector and three of the seven senior fellows. Then the statute goes on further, that if the rector be removed by the bishop's commissary, *etiam consentientibus* four of the senior fellows, he may appeal to the bishop. Then there is another statute, which shews for what faults and crimes the rector shall be deprived; wasting or alienating the revenues or goods of the college; adultery; and some particular things. Then it sheweth the method that shall be taken against him when they do proceed to deprivation, *i. e.* within fifteen days after the fact committed he shall by the college be admonished to resign. Then they are to apply to the bishop, and if he be convicted, the bishop or his vicar may proceed to deprive him. There was one *Colmer*, a scholar, expelled the college by the rector and fellows for incontinency; against this expulsion he appealed to the bishop, as visitor, in *March* 1690. Upon the appeal the bishop granted a particular commission to doctor *Masters* to examine this matter. He went to the college, and his proceedings are found in the verdict, and re-

(a) Vide 1 Lord Raym. 5.

versed the sentence of expulsion, and restored *Colmer* to his fellowship. After this the bishop appointed a visitation to be held in the chapel, when the doors were shut. The rector and scholars would not open the doors, but protested in the area against the visitation. The visitor called over the names of the rector and scholars, and swore one to prove the summons, and went away without doing any thing more. After this another visitation was appointed in the hall, to be held the 24th of *July*; at which time the bishop repaired thither, and divers protestations against the visitation were made: but he proceeded, called over the names, registered the act of the 16th of *June*, and upon several warnings to appear doctor *Bury* and divers of the fellows absented themselves, and refused to submit to the visitation, and were pronounced contumacious. The bishop first expelled doctor *Horne*, and suspended some of the senior fellows, and afterwards, with the consent of the unsuspended fellows, deprived the rector, doctor *Bury*; that sentence of deprivation being thus given, the college proceeded to a new election, and elected Mr. *Painter*, who joined in the lease to the plaintiff upon which this action is brought.

Now the question is, whether this sentence of deprivation, thus given by the bishop against doctor *Bury*, doth make the rectorship of *Exeter* college void as to him; and so consequently gives a title to the lessor of the plaintiff?

My brothers have all given their opinions that this sentence of deprivation is a void sentence; that doctor *Bury* continues rector, and the rectory is not void by that sentence; and that judgment ought to be given for the defendant. I must crave leave to differ from them in this case; for I am of opinion upon this verdict that judgment ought to be given for the plaintiff, and that this deprivation by the visitor is a good deprivation to void the rectory.

The questions that I make in this case are but these two;

The first is, Whether or no by the constitution of this college the bishop of *Exeter* had power in this case to give sentence?

The second is, Supposing he had such a power, whether the justice of this sentence be examinable in this court upon this action?

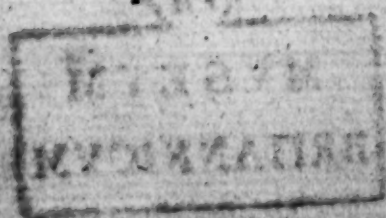
And I am of opinion the bishop had power by the constitution of the college to give a sentence; and having that power,

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the

1788.

PHILIPS
against
BURY.



1788.

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PHILIPS
against
BURY.

the justice of that sentence is not to be examined in a court of law upon an action.

Concerning the bishop's power there have been several things said which I would take notice of; and the first thing is, what time he hath by the constitution of the college to make his visitation in. And I agree that he can make his visitation but once in five years, unless he be called by the request of the college; and if he comes uncalled within the five years, his visitation would be void; and if he gave them any sentence, that would be a mere nullity, as *coram non judice*; but I hold that the visitation of the 24th of July was a good visitation, and consequently the sentence given upon it is good. Two objections have been made against it;

First, It is objected, that doctor *Masters's* coming in *March* to examine *Colmer's* appeal upon the visitor's commission was a visitation. I think there is no colour that it should be accounted a visitation: my reason is, because it is only a commission upon a particular complaint, made by a single expelled fellow, for an injury supposed to be done to him. *Colmer* complained that he was expelled without just cause, and appealed to the visitor for redress; they expelled him for incontinency, whereas he thought himself innocent; and the visitor sent his commissary to examine this particular matter only. Now though the visitor be restrained by the constitutions of the college from visiting *ex officio* more than once in five years, yet as visitor he has a standing constant authority at all times to hear the complaints and redress the grievances of the particular members; that is the proper office of a visitor, which appears by *Littleton*, *f.* 136. And so it was held in *Appleford's* case in this court, who was expelled upon a like accusation as *Colmer* was; he appealed to the visitor, the bishop of *Winton*, who confirmed the expulsion. For visiting is one act, in which he is limited to time: but hearing appeals and redressing grievances is his proper office and work at all times. It is like unto the case of all the bishops of *England*; they can visit but once in three years; but their courts are always open to hear complaints, and determine causes. So that though the bishop here can visit but once in five years, unless called, yet he hath power and authority to hear any difference between the members; and redress any particular injury, at any time. Then the next thing to be considered is, whether that which was done on the 16th of *June* was a visitation.

Now



Now there is no question but that the bishop did intend to visit then, and went thither to proceed in the visitation; but they would not let him enter into the chapel, where he had appointed it to be held. It would be very absurd to construe his coming there to visit to be a visitation, which imports a judicial proceeding. It appears he did not any act, but called over the names, to see who it was that hindered him from visiting. But then it is said after this he administered an oath at the time, and when he came in *July* he made an act of it. Therefore, saith my brother *Eyre*, this is a tacking the visitation in *June* to that of *July*; and then the visitation continued much longer than was intended, nay, than it can continue by the constitution and statutes of the college; for it is thereby to cease in three days. Truly I make a quite other construction of it; when he was hindered in *June*, and made an act of this at his visitation in *July*, that was only in order to his calling them to account for their contumacy, and to bring them in judgment at his visitation; it is no more than taking an affidavit at the service of his citation. If that which was done in *June* should amount to a visitation, it would be in the power of the rector and fellows by their contumacy at any time to hinder the effect of a visitation, and such their contumacy would never be punished.

The next thing to be considered is what ariseth from the construction of the statute *de visitatione*, whether there is a necessity that there should be the consent of the four senior fellows to the deprivation of the rector; for if there were such a necessity by the statutes of the founder, I agree this sentence had been a nullity. But as this statute is framed, I conceive it is not necessary; but that the bishop has a power to deprive the rector, though the four seniors concur not in the sentence, for these reasons; first, By the statutes the bishop of *Exeter* for the time being is made the ordinary visitor of *Exeter* college; and it is clear that, where any one is visitor of a college, he has full and ample power to deprive and amove any member of the college, *quà visitor*. 2dly, There is an expresse power given to the bishop to proceed to the deprivation of the rector, or the expulsion of a scholar, in his visitation. But now, 3dly, Though there be qualifications of the bishop's power in the expulsion of a scholar, yet the bishop's power in depriving the rector is not restrained to be with the consent of four of the seven senior fellows. The words are "*Si tamen ad deprivationem aut inhabilitatem rectoris aut expul-*
sionem"

1788.

PHILIPS
against
BURY.

1788.

PHILIPS
against
BURY.

*“fionem scholaris alicujus per episcopum Exon vel ejus commissa-
“rium agatur, dummodo ad ejus expulsionem concurrat consensus
“reſtaris et trium de ſeptem maxime ſenioribus ſcholaribus.”* And I would obſerve, it is *deprivatio* as to the reſtor; and it is *expulſio* as to the ſcholar; and though I do agree the words are ſynoni-
mous, yet by this ſtatute they are differently applied; and it is
impoſſible the conſent ſhould relate to the reſtor, for then he muſt
conſent to his own deprivation, and it is impoſſible to imagine he
ſhould ſo conſent; for in this place the conſent of three of the ſe-
nior fellows is not to do, without there be the conſent of the reſtor.
But then the ſubſequent words are, that if the reſtor be deprived
by the biſhop's commiſſary, although four of the ſenior fellows
do conſent, he may appeal to the biſhop. The reſtor hath that
liberty, if the biſhop's commiſſary deprive him. But where are
there any words that do abridge the biſhop's own power? The
commiſſary's power ſeems to be abridged by theſe words, “to
“have their conſent;” and yet that is but by implication nei-
ther. But the ſtatute hath appointed no qualification of the
biſhop's power. Here are expreſs words that he may proceed to
the deprivation of the reſtor, not only by the general words of
making him viſitor, but particular words for that purpoſe in the
very ſtatute. Then ſhew ſome other words to qualify this
power; for I, for my part, find none. I do find ſome that qua-
lify the commiſſary's power, but none that reach the biſhop's.
It is objected that it is very unreaſonable to imagine the founder
ſhould give a greater authority to the viſitor over the reſtor than
the ſcholars; the queſtion is not what was reaſonable or fit for
the founder to do, but what he hath done upon a view and pe-
ruſal of the ſtatutes. Suppose he doth give the biſhop ſuch an
absolute authority, it is not in our power to control it for any
imagined unreaſonableneſs; and it is to be ſuppoſed that the
founder had ſome reaſon for giving the biſhop ſuch power over
the reſtor; though if he had not, it is not material; his will is
his reaſon in ordering and diſpoſing of his own; and it is not
in our power to take away this authority from him, becauſe we
think it unreaſonable. Then conſider the reſtor hath a benefit
that the ſcholars have not; for if the commiſſary viſit the col-
lege, and deprive him with the conſent of four ſenior fellows,
he may have an appeal to the biſhop; but the ſcholars can have
no ſuch appeal. And it may be the founder thought fit to truſt
the reſtor with the biſhop alone, as knowing that he would take

more care of the head of the college than he would of the inferior members of it. But after all, I say again, who knoweth what reason a man may have? Every man is master of his own charity, to appoint and qualify it as he pleaseth. Now if the bishop of *Exeter* be by statute in exprefs words made visitor of the college, and hath by exprefs words a power given him to proceed to the deprivation of the rector, and there were no words to lessen that power, I would fain know how we can make such a construction as to limit this power to be with the consent of four senior fellows. So that I think by the statutes in this case, and the constitutions of the college, the bishop being made visitor, and having authority to deprive him without any qualification of that authority, he might proceed to deprive him without the consent of the four senior fellows; though I do agree, if their consent had been necessary, the suspension doth not make them no fellows during the suspension, for it is only an impediment to them from enjoying any benefit from their office, but it makes no vacancy of the office at all. For if a minister be suspended, during the suspension the place is full (a); and if the rector had been suspended, the rectory had been full, and he might with the fellows have maintained an assize for the lands of the college, and he is as much rector as before; and then if a suspended fellow remained a fellow, if it were necessary for them to consent, such a fellow is as much impowered to consent as ever he was; but I think it was not at all necessary as the case is. This next point is no more than this, whether (supposing the bishop has an authority to deprive the rector, and he doth by sentence deprive him) the justice of this sentence be examinable in any of the courts of common law; that is, first, whether the sufficiency of the sentence as to the cause be examinable in the common law courts; and, secondly, whether the truth of that cause, suppose it to be good and sufficient to ground the sentence if true, can be enquired into or be examined. And I think the sufficiency of the sentence is never to be called in question, nor any enquiry to be made here into the reasons or causes of the deprivation. If the sentence be given by him that is visitor, created so by the founder, or by the law, you shall never enquire into the validity or ground of the sentence; and this will appear, if we consider the reason of a visitor, how he comes

1788.

PHILIPS
against
BURY.

(a) Vide 1 vol. 526.

1788.

PHILIPS
against
BURY.

to be supported by authority in that office. And that we may the better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government, and such as are for private charity. Those that are for the public government of a town, city, mystery, or the like, being for public advantage, are to be governed according to the laws of the land; if they make any particular private laws and constitutions, the validity and justice of them is examinable in the king's courts; of these there are no particular private founders, and consequently no particular visitor: there are no patrons of these; therefore, if no provision be in the charter how the succession shall continue, the law supplieth the defect of that constitution, and saith it shall be by election; as mayor, aldermen, common council, and the like; and so it was in the case of the town of *Launceston*, 1 *Roll's Abr.* 513. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and therefore, if there be no visitor appointed by the founder, the law appoints the founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founder. So it appears by the cases in *Yelv.* 65. and 2 *Cro.* 60. *Fairchild* and *Gaire*; where it is now admitted on all hands that the founder is patron, and, as founder, is visitor, if no particular visitor be assigned. And so is 8 *E.* 3. *Aff. Placit.* 29. 31. *So that patronage and visitation are necessary consequents one upon another*; for this visitatorial power was not introduced by any canons or constitutions ecclesiastical (as was said by a learned gentleman, whom I have in my eye, in his argument of this case); it is an appointment of law; it ariseth from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him and his heirs a visitatorial power, that is, an authority to inspect the actions and regulate the behaviour of the members that partake of the charity; for it is fit the members that are endowed and that have the charity bestowed upon them should not be left to themselves (for divisions and contests will arise amongst them about the dividend of the charity), but pursue the intent and design of him that bestowed it upon them. Now indeed, where the poor, or those that receive the charity, are not incorporated, but there are certain trustees who dispose of

of the charity, according to the case in 10 Co. there is no visitor; because the interest of the revenue is not vested in the poor that have the benefit of the charity, but they are subject to the orders and direction of the trustees. But where they who are to enjoy the benefit of the charity are incorporated, there, to prevent all perverting of the charity, or to compose differences that may happen among them, there is by law a visitatorial power; and it being a creature of the founder's own, it is reason that he and his heirs should have that power, unless by the founder it is vested in some other. Now there is no manner of difference between a college and an hospital, except only in degree; an hospital is for those that are poor, and mean, and low, and sickly; a college is for another sort of indigent persons; but it hath another intent, to study in, and breed up persons in the world, that have not otherwise to live; but still it is as much within the reason of hospitals. And if in an hospital the master and poor are incorporated, it is a college having a common seal to act by, although it hath not the name of a college (which always supposeth a corporation) because it is of an inferior degree; and in the one case and in the other there must be a visitor, either the founder and his heirs, or one appointed by him; and both are eleemosynary. A visitor being then of necessity created by the law (as 8 E. 3. 69. 70.) every hospital is visitable either by the patron if a lay hospital, or by the ordinary if spiritual. What is this visitor to do? He is to judge according to the statutes and rules of the college. He may expel, and, as in 8 Aff. 29. 31, he may deprive. The only question there was, who was visitor? For it is agreed on all hands, that *quatenus visitor* he may deprive: if he be visitor as ordinary, there lieth an appeal from his deprivation; but if as patron, then none; that deprivation, whether by right or wrong, was to stand good. But you will say the visitor hath no court, and it is unreasonable to conclude a man by the sentence of one that hath no court. It is (I say) not material whether he hath a court or no, all the matter is whether he hath a jurisdiction; if he hath a jurisdiction and cognizance of the matter and person, and he giveth sentence in the matter, his sentence must make a vacancy, be it never so erroneous; but there is no appeal, if the founder hath not thought fit to direct one. That an appeal lieth to the common law courts of *England* is without precedent. It is plain by all the authorities of our books, and by the way of pleading, that

1788.

PHILIP
against
BURY.

1788.

PHILIPS
against
BURY.

that the cause of the visitor's sentence is not examinable: if a sentence of deprivation be pleaded, you need not shew the cause; it is not traversable even in a visitation, when it is by the visitatorial power; so is *Rastal Entr. fol. 1. 11 H. 7. 27.* and *7 Co. 42. Kenn's case.* Now I would suppose that this rectory had been a sole corporation, and not a corporation aggregate of rector and scholars, and Dr. Bury had brought an assize, and then this deprivation is pleaded; I would know of any whether it were not a good plea to shew that the visitor had *pro certis causis &c.* deprived him; without all question it had been a good plea, and not examinable. For every thing that is examinable must be expressed in certainty. Now it is strange that pleading a sentence, without shewing the cause, should be good, and finding a sentence in a special verdict, without finding the cause, should not be as good and conclusive to the party. I thought things had been more exactly to be pleaded than set forth in the finding of a jury upon a special verdict; and if in pleading it is not traversable, the argument is the strongest that can be that the cause is not enquirable into. For if it were, a fairer opportunity must needs be given than upon a special verdict which concludes the party as to the fact that is found. As to the matter of there being no appeal from an arbitrary sentence, it is true the case is the harder, because the party is concluded by one judgment; that does make it the more severe upon the rector, but it doth not lessen the validity of the sentence. If the constitution had been that if the visitor doth deprive the rector, then he might appeal to the archbishop of *Canterbury*, it had been more equitable; but in that case if there had been any appeal, and the sentence had not been reversed, then the deprivation had been in force, and irremediable in any court of law. And I do not know any authority of law that makes the sentence to be the weaker, because the party deprived is barred of an appeal. In the case of *Cawdry* and The High Commission Court, a sentence of deprivation was given against him by that court, and there was no appeal. In the case of *Allen and Nash, Jo. 393,* the sentence was found, but no cause shewn; yet it was held to be well enough, though no appeal did lie, the sentence being in the high commission court. How doth my brother *Eyre* distinguish this case from ours here? He says that it was by virtue of the ecclesiastical law; I would fain have any body tell me the difference; for in one case

case as well as the other there is a lawful jurisdiction to deprive without appeal; if then in one case the sentence be conclusive, though there be no appeal, why by the same reason should it not be as conclusive in the other? It was so in the case of *Bird and Smith*, *Moor* 781. Where a man was deprived for not conforming to the canons. A case certainly very hard, for all the canons are not according to law, nor any of them obligatory further than as received and allowed time out of mind. Now as to the cases of *Coveney*, *Dyer* 209. and *Bagg's* case, 11 *Rep.* 99; that the party deprived shall have an assize when no appeal, I take the cases to be all one as to this matter, though in two books; and there being an error in the first, it was not rectified afterwards. *Coveney*, president of *Magdalen College* was deprived by the visitor, not as ordinary, but as visitor. The question was, whether there would lie an appeal from the visitor's sentence to the king; it was held there could be none to the archbishop, because it was not done as ordinary, but as visitor. What then? Why there is this collection by the reporter, *ex hoc sequitur*, says he, that *Coveney*, who was deprived, shall have an assize. And that was the cause of the opinion of my Lord *Coke*, that is cited in *James Bagg's* case, and he there quotes the book 8 *E.* 3. 8 *Aff.* for such a distinction. But if there be an inspection into the book, there is no such distinction in the book to be found; the party is concluded in that case as well as the other. Therefore there is an end of that opinion, for the foundation fails and is not warranted by any authority. But besides it is reasonable to suspect that case not to be law, when the instance is impracticable which it is brought to prove. The head of a college cannot maintain an assize for his office of headship. He hath not such estate as will bear it. Therefore to give such an instance as is in *Coveney's* case, is to overthrow the authority of the case. The head of such a body cannot maintain an assize for his headship, for he hath no sole seisin; the whole body of the college have an interest in the estate, he has not a title to a penny of the revenues in his own right, till by consent they be privately divided and distributed; and then too it is not the rector's money, it is *Dr. Bury's* money after division. It is a notion that cannot be maintained or supported by the rules of law: he is indeed the only visible person of the body, but he has no separate right. Now in *Appleford's* case the like argument was used in this court in my Lord *Hale's* time, and

1788.

PHILIPS
against
BURY.

1788.

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PHILIPS  
against  
BURY.

then it was insisted upon that he might have an affize. No says my Lord *Hale* that is impossible, and I remember very well he did disallow of that opinion of my Lord *Coke*. Truly I know no difference between this case and that of a *mandamus*; it will not enter into my head, I must confess, where the difference lies. In that case of *Appleford*, there was a *mandamus* brought to restore him to his fellowship. It was returned that by the statutes of the college for misdemeanour they had power to turn him out, and that the bishop of *Winchester* was visitor, and that he was turned out *pro crimine enormi*, and appealed to the bishop who had confirmed the expulsion, and the particular cause was not returned. I know it very well, for I was of counsel for the college, and we omitted the cause in the return for that reason, because we thought it not sufficient. It was strongly urged that we ought to shew the cause of expulsion in the return, to bring it within the compass of the statute. It was answered no; There was a local visitor who had given the sentence, and be it right or be it wrong, the party is concluded by it; and the members of the college must submit to such laws as the founder is pleased to give them; and Mr. *Appleford* was not restored. Whether he be yet living or not I cannot tell, but he was kept out all his days, if he be dead. There is an express authority to guide us in our judgment in this case. Here a local visitor hath given a sentence, and thereby actually deprived the rector of his place; and why the law should not be the same when the case appears in a special verdict in an ejectment, as in a return to a *mandamus*, no reason can be given. At this rate we shall always be out at sea, and at uncertainties, and not know when we shall come at shore. I thought we had been come to some certainty at law since that case of *Appleford*, that where there is a visitor, and he hath power to proceed to deprivation, this court ought to give credit to the justice of his proceedings as much as to those of any judge; and I remember that my Lord *Hale* took it for clear law, that such a sentence was as strong as a judgment in an affize to bind the party deprived. He is made a judge and particularly designed by the founder. But he hath his authority from the law; and he is to judge by the statutes. The founder hath trusted this particular matter to his direction, and why shall we suspect him that he will not do right? Then for the next point; suppose the cause is examinable, yet the cause need not be found in the verdict; for if a deprivation be found



found by the jury, we must presume it to be just; we are to give credit to a man that exerciseth judicial power, if he keep within his jurisdiction. The law hath respect not only to courts of records and judicial proceedings there, but even to all other proceedings, where the person that gives his judgment or sentence hath judicial authority, and you shew no fault in the sentence; the jury do not so much as find that the matter and ground of it is untrue or insufficient in point of law, or any other fault or defect whatsoever; but it appears that the cause of deprivation is good, it being for contumacy. If the bishop had power to visit in *June*, as I think he had, and was hindered by shutting the doors, whereupon he went away without doing any thing, and came again in *July*, when he held his visitation; and they carried themselves contumaciously and refused to submit to his authority; this was *contra officii sui debitum*. It is by the constitution of the college inseparably incident to their places, that both head and members should submit to the visitation. And contumacy is held a good cause of deprivation. It was held a good cause in *Bird* and *Smith's* case, and in the case of *Allen* and *Nash*; *Quod fuit refractarius*. Now though this is not one of the causes mentioned in the statute of deprivation, yet when the bishop comes to make a visitation and the members refuse to submit, it is certainly contrary to that duty which their places oblige them to perform. I do not think that entering a protestation against the visitation was any fault; that was surely very lawful, but their turning their backs upon the visitor, and not appearing upon summons, and refusing to submit to his examination, was an offence, and contrary to that duty which the statutes do require. For the visitor is to enquire into the state of the college, and each one's particular behaviour and conformity to the college statutes; and if he comes to make such an inquisition, and the head or the members do absent themselves, or will not appear to be examined, it tends to the subversion of the whole constitution of the college, which is a good cause of deprivation. And though there is a particular statute which declares for what causes the rector should be deprived, of which this is none, yet that doth not extend to a deprivation in time of visitation, but it sheweth in what manner the college shall proceed to get the rector, if guilty of such offences, removed. They may complain to the visitor when he is not in his visitation, if he wastes his revenues, or behaves himself scandalously, and

1788.

PHILIPS  
against  
BURY.



1788.

PHILIPS  
against  
BURY.

and upon request will not resign, and they may article against him before the visitor, out of his visitation; but when he comes to execute his visitatorial power in the quinquennial visitation, he is to enquire into all the affairs of the college, and he is not to proceed in that case upon the information of the fellows, but he may proceed even to deprivation wherever he seeth cause. And contumacy, I take it, is a cause of forfeiture of his office, being an offence against the very essence of his place, whereby he is subject to the power of the visitor; and if he goes about to evade, or contumaciously refuseth to submit to, his power and authority, it is an offence against the duty of his place, and a good cause of deprivation. So that I do hold in this case, First, That the bishop of *Exeter* hath a visitatorial power vested in him to deprive the rector, without the consent of the senior fellows. Secondly, That the justice of this sentence is not to be examined into here. And Thirdly, If it were, and the cause were necessary to be shewn, I think contumacy is a very good cause of deprivation, being an affronting him in his visitatorial authority. Though I do believe Dr. Bury did not design to affront the bishop, but to assert his right; Yet *ignorantia juris non excusat*. If the law be that he ought to submit, which he refuses, we cannot help it. I am far from being such a judge as shall lay any intolerable yoke upon any one's neck; but I must say if the head and members of a college will receive a charity with a yoke tied to it by the founder, they must be contented to enjoy it in the same manner they received it from him. If they will have one, they must submit to the other. And so my judgment ought to be given for the plaintiff: but my brothers are all of another opinion, and so I submit to it. The defendant must have his judgment.

Friday,  
April 18th.

D O R E against G R A Y.

The commissioners of sewers have jurisdiction over a sewer communicating with a navigable stream, or

with the sea, above the point where the tide ebbs and flows, if the place, over which the jurisdiction is exercised, is or is likely to be benefited by it.

THIS was an action of trespass for taking the plaintiff's goods; to which the defendant pleaded the general issue, and a justification under the commissioners of sewers for the *Tower Hamlets*, in *Middlesex*, (excluding *St. Catharine's* and *Blackwall Marsh*) for the non-payment of 11s. 8d. assessed by



them under the statute 23 *Hen. 8.* Replication, *de injuriâ suâ propriâ absque tali causâ.* At the trial at the *Westminster* Sittings after last *Trinity* Term, before *Buller, J.* the jury found a verdict for the plaintiff, subject to the opinion of this court on a case reserved. The plaintiff's house, and the place where the work on the sewer, for which the assessment in question was made, has been done, are above two miles from the city of *London*, and are within the *Tower Hamlets*, and not in *St. Catharine's* or *Blackwall Marsh*. The tide flows and reflows over part of the land where the work was done, but not through and over the whole; yet all was marsh land, and is twenty miles distance from the sea. Boats go on the shore from the *Thames* to a certain place called the *Dye House* which is about fifty yards, and about a mile and a quarter from the place where the work on the sewer had been done. Unless the sewers which lie above the dye-house are cleansed, the work in the remaining part of the sewers will be of no avail. The plaintiff might have sustained disadvantage if the works had not been done. The parish of *Hackney*, in which the plaintiff's house is situate, has for several years past been rated to the sewer's tax for the same. And the rate in question, under which the defendant distrained the plaintiff's goods, was regularly made, if the commissioners were authorized to make the same. The question for the opinion of the court is, whether the plaintiff is entitled to recover in this action?

*Burrough*, for the plaintiff, observed, that as this was a question of special jurisdiction arising on the construction of the statute 23 *Hen. 8. c. 5.* the best mode of obtaining the true construction of it was to enquire how the law stood before it was passed. It is said in 10 *Co. 141.* that at common law the king was bound to defend his realm as well against the sea as against the enemies, that it should not be drowned or wasted; and also to provide that his subjects have their passage through the realm by bridges and highways in safety; and therefore if the sea walls be broken, or the sewers or gutters be not scoured, that the fresh waters cannot have their direct course, the king ought to grant a commission to enquire into it; which commission appears in the register 127. and in *F. N. B. 113.* The sewers and gutters here mentioned must be understood those only in the vicinity of the sea, such as immediately conducted the fresh water to the sea, and cannot extend to sewers at any distance from the sea; for that would be to make the jurisdiction infinite:

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1788.

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DORÉ.  
against  
GRAY.



1788.

DORR  
against  
GRAY.

but it is evident from the whole of this passage, that it went no further than to prevent the danger of the sea overwhelming the country; and the commission in the register 127 proves this. It appears from *Heighley's case* (a), that if the damage done were of such a nature that private individuals, who were bound to repair the walls or banks, could not guard against the accident, a commission issued to enquire who was to suffer any loss or damage; and they were to contribute to the repairs; but if it were such that care could prevent, then the expence was to be borne by those who were bound to repair. These matters were originally the object of a criminal jurisdiction; and the breach of an obligation to repair the banks, &c. was an indictable offence; these commissions of oyer and terminer were granted for each particular purpose (b); they issued to prevent any sudden danger, where the emergency was such, that it would have been dangerous to wait for the arrival of the judges on their *iter*. In 12 *Mod.* 331. Lord *Holt* said, "Commissions of sewers to defend the kingdom against the sea are very ancient, and even by special prescription in some cases: but sewers for melioration of land are by act of parliament." This being the common law jurisdiction, unless some material alteration can be found in the statutes so as to extend the jurisdiction to the matter now in question, the modern commissions which are manifestly founded on the old one, can apply only to such cases, and the prevention of such mischiefs as were the cause of issuing the old commissions. The statutes relative to the commissions of sewers may be divided into two classes; 1st. those which precede the statute 6 *Hen.* 6. c. 5. And secondly, those which were passed from that time. Those under the first class are 9 *Hen.* 3. c. 23. 25 *Ed.* 3. st. 4. c. 4. 45 *Ed.* 3. c. 2. 1 *Hen.* 4. c. 12. 4 *Hen.* 4. c. 11. 1 *Hen.* 5. c. 2. and 12 *Ed.* 4. c. 7. These statutes, though they say nothing relative to this question, are yet now deemed part of the law of sewers, in consequence of a clause introduced into the commission of sewers prescribed by the 23 *Hen.* 8. They only relate to the free navigation of the great public rivers, and the preservation of the fish in those rivers, and have no relation to the coasts of the sea; so that they cannot be considered in any measure to extend the jurisdiction of the commissioners of sewers. With respect to the second class of statutes, and which are more properly called the statutes of sewers; it is necessary to premise that no alteration was intended to be made

(a) 10 *Co.* 139.(b) 3 *Bl. Com.* 73.



by them in the general subject of their jurisdiction. The object of them was to encrease the duration of the commissions of sewers instead of suffering them to issue, as at common law, only *pro re nata*; to require certain qualifications in the commissioners, and to enable them not only to make, but to execute, ordinances; for which purposes a standing form of commission was prescribed. The first of these is the 6 *Hen. 6. c. 5.* which only directs that commissions of sewers shall be granted in the form prescribed. After reciting that the walls, ditches, gutters, and sewers, *by the coast of the sea and marsh* within the limits of *Lyndesey, Lincolnshire*, are so broken by the flowing and reflowing of the sea, and inundations of fresh water descending to the sea, that for want of repair great damage is likely to arise, it directs who shall be taxed, and that the commissioners shall make ordinances and laws for the safety and conservation of *the coast of the sea and marsh aforesaid*, according to the laws and customs of *Romney Marsh*. Now though by this case it is found that all the land in question was marsh land, yet it is twenty miles distant from the sea. It is clear, as well from the common law jurisdiction, as from the language of this commission so prescribed, that no jurisdiction was ever to be exercised over marsh land, *quasi* marsh land. But it was only to be exercised over the marshes on the confines of the sea, over which the sea had flown, or was likely to flow, by breaches in the banks of the sea; there the banks were to be repaired for the conservation of the coast of the sea. But if the statute, or common law, gave a jurisdiction over marsh land, and the nature of that marsh was so much altered that there was no danger of inundations of the sea, the commissioners' jurisdiction would be at an end. Therefore the insertion in this case, that all was marsh land, cannot vary the case, for the case expressly finds that it was twenty miles distant from the sea. The statute couples coast of the sea and marsh: but marsh which is twenty miles from the sea cannot possibly be considered to be marsh on the coast of the sea. If the statute be not thus confined, it has no limits. But to carry it farther would be to extend it to matters totally wide of its object, which was the defence of the realm against the violence of the sea. And this would be confounding the general law of sewers with particular statutes made for the melioration of land. The next statute is that of 8 *Hen. 6. c. 3.* this gives the commissioners power to execute their own ordinances which the statute says they

1788.

DORR  
against  
GRAY.



1788.

DORR  
against  
GRAY.

they had no power to do. The statute 18 *Hen. 6. c. 10.* speaks of the great encrease of the waters of the sea; it mentions that the 6 *Hen. 6.* was temporary only, and directs the commissions to be granted for ten years. The 23 *Hen. 6. c. 8.* 4 *Hen. 7. c. 1.* and 6 *Hen. 8. c. 10.* are only confirmative of the former. The two first of them direct commissions to be issued, the first for fifteen, the second for twenty-five years. And the last directs them to be issued for ever. But none of these make the least alteration in the jurisdiction of the commissioners of sewers. Then follows the statute 23 *Hen. 8. c. 5.* on which the question immediately depends. It is entitled, "The bill of sewers, with a new proviso." But it will be found on examination that this statute does not extend the jurisdiction of the commissioners to the present case. It only provides against the overflowing of the sea, as is evident from the recital of 1 *Mary, st. 3. c. 11.* Under the first set of statutes the commissioners have no authority, but to remove obstructions to navigable rivers. The second class, which manifestly extends only to the sea and its coasts, gives power of guarding against inundations of the sea. The marsh land, in this case, must be taken to be private ground; And it appears by the commission in the register, that the crown never had jurisdiction over private marsh land, and by the statutes, that the legislature never meant to give it. Then it remains to be enquired, by what means the commissioners had any jurisdiction in the present case? The statutes of sewers only extend to such streams as are navigable, in which the tides of the sea ebb and flow, and not beyond the spot where they are so navigable, and where the tides ebb and flow. It is not contended that, if by means of any violent agitation of the sea the banks should be broken, and the sea-waters make their way to any distance whatever, a commission of sewers might not issue for the purpose of restoring the banks, &c. and that there would not be *pro tempore* a jurisdiction as far as the damage reached; but no necessity of that kind exists here. And there is no danger that *Hackney Brook*, which conveys the waters from *Hampstead*, &c. into the river *Lee*, through *Hackney* and the marsh-land grounds belonging to it, should ever require such an extraordinary interposition. That this is the true construction of the statute 23 *Hen. 8.* appears from the 3 *Jac. 1. c. 14.* entitled "An act for explanation of the statute of sewers," which has, in express terms, declared that no sewers, streams, or water-courses, are within



within the 23 *Hen.* 8. unless the water ebbs and flows therein, and free passage with boats &c. to the sea hath been theretofore used. Lord *Coke* (a), after reciting the statute of 3 *Jac.* 1. c. 14. adds in the margin, "*Nota*, An excellent exposition of the statute 23 *Hen.* 8. by this parliament of 3 *Jac.*" And this court in the case of *Yeaw v. Holland* (b), where a question arose relative to the jurisdiction of commissioners of sewers; though they strongly inclined for the defendant (who justified under the commissioners), had the matter been *res integra*; yet thought the legislative exposition of the statute of *James* the First too strong for them to get over, and gave judgment for the plaintiff. It is observable, that the defendant's argument in that case was chiefly founded on a supposition that the statute 3 *Jac.* 1. c. 14. was not a general law, merely because *Callis* has not noticed it in his book: but the answer is, that lord *Coke* has not only mentioned the statute, but has likewise made an observation on it in the margin, which removes all doubt; and this omission by serjeant *Callis* of so material a statute is a strong proof of the incorrectness of his readings. It is indeed stated in this case that the tide flows and reflows over part of the land where the work was done, *but not through and over the whole*: and that boats go on the shore from the *Thames* to a certain place called the *Dye House*, which is about fifty yards, and about a mile and a quarter from the place where the work on the sewer was done. But then it must be contended by the defendant, that, because the tide flows over *part*, and because boats go about fifty yards, the commissioners have jurisdiction over the *whole*, as much as if the tide flowed over the whole, and the whole was navigable by boats. And even this is on a supposition that it is a navigable river, which is not found by the case. But it is too absurd to contend that it is a common navigable river, because it appears by the case that boats go from the *Thames* to a dye-house; for these are the boats of a private person, and not of the public. Thus stands the general question.

But at all events the plaintiff is entitled to judgment; for the act complained of is entire; and though the court should be of opinion that the commissioners had jurisdiction over part of the land in question, yet undoubtedly they had not over the whole, and so they have exceeded their jurisdiction. It is expressly found that boats do not go over the whole, and that the tide

1788.

DORR  
against  
GRAY,(a) 4 *Inst.* 276. (b) 2 *Bl. Rep.* 717.



1788.

Doke  
against  
Gray.

does not flow over the whole; to obviate which, it is also stated that, if the sewers above the dye-house are not cleansed, the work in the remaining part would be of no avail. It is not stated that any work at all has been done below the dye-house; and on the contrary it seems that there are no works near the dye-house. Now in the first place the court cannot understand what is meant by the works above the dye-house; neither can they decide that the works above the dye-house are necessary to make the works in the remaining part of avail, since it does not appear where those works in the remaining part were. And even then they must point out how far the limits of the jurisdiction extend; and it cannot be said that, because the commissioners have jurisdiction over part of a navigable stream where the tide ebbs and flows, it shall be extended beyond that point. At all events it can only be carried to one entire work, immediately connected with, and part of, a work within their jurisdiction. The commission authorises the commissioners to enforce these statutes over the subject matter within a certain district: and there is no difference, as to this question, between the local bounds of a jurisdiction over a matter of a general nature, and a special jurisdiction of local matter within a given space. This special commission for particular purposes cannot be extended beyond those purposes, any more than a commission of oyer and terminer for one county can be extended to another.

*Douglas*, for the defendant. This question turns on the statute 23 *Hen.* 8. If the facts here found bring this case within the jurisdiction given by that act of parliament, the plaintiff is not entitled to recover; and the positive provisions of this statute cannot be restrained by the recital of the statute 3 *Jac.* 1. which is merely an explanatory act: it must be taken to be a misrecital, because it is not followed by any enacting clause. It is not necessary that the tide should flow and reflow, and that there should be a common passage for boats, in order to give the commissioners of sewers a jurisdiction under the statute 23 *Hen.* 8. Those are only mentioned as grounds and circumstances to give a jurisdiction, but are not the only ones, nor used as excluding all others. He was then stopped by the court, who had no doubt about the question.

*ASHHURST, J.*—This appears to be a case within the words of the statute 23 *Hen.* 8. And as it is stated in the case that the works of the commissioners of sewers are beneficial to all the lands



lands on this level, and to the plaintiff in particular, we ought not to narrow the construction of the statute. Neither should we permit the operation of that statute to be restrained by the recital of the statute 3 *James I.*; for the bare recital in a statute is not sufficient to repeal the positive provisions of a former statute, without a clause of repeal. It appears that the commissioners of sewers were intended by the 23 *H. 8. c. 5.* to have a jurisdiction in such cases as the present; for it recites that damages have happened by reason of the outrageous flowing of the sea in and upon marsh grounds and other low places, as also by occasion of land-waters in and upon meadows, pastures, and other low grounds adjoining to rivers, floods, and other water-courses; and mentions in the commissions to be granted that the walls, ditches, &c. by the coast of the sea, and marsh ground, were broken by rage of the sea flowing and re-flowing, and by means of the trenches of fresh waters descending, and having course by divers ways to the sea. Over these therefore the commissioners were to have jurisdiction. Now in the present case this is a water-course leading to the sea: and though it is stated that the tide does not flow over the whole ground where the work in question was done, yet it flows over part. It is likewise stated that all was marsh land, and that unless the sewers in the upper part of the ground are cleared, the work in the lower part will be of no avail. This therefore appears to be both within the words of the statute, and the mischief intended to be remedied by it.

BULLER, J.—After stating the case. First, it is objected that this is not stated to be a common sewer: but stating it to be a sewer is stating it *prima facie* to be a common sewer; it also appears to be a common sewer, because it is stated in the case that the tide flows and re-flows there. And upon this case the court is bound to say that it is a common sewer. Now what is a sewer? It is common and public in its nature; it is so considered in *Callis's Readings*, one of the best performances on that subject, and which has always been admitted as good authority. But the statute mentions several things which are not of a public nature, as drains, gutters, ponds, &c. which are private, and on which there can be no navigation; and yet these are expressly subject to the jurisdiction of the commissioners of sewers. The line to be drawn is this; if they are necessary or useful in navigation, the statute does extend to them; otherwise they are not within

1788.

DORR  
against  
GRAY.



1788.

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DORE
against
GRAY.

within it. Now in this case they are useful; and that distinguishes it from the case in *Blackstone*; for in that case there was no navigable stream, no passage for boats, the tide did not flow there, and it was dry at some seasons of the year, but in wet seasons it was necessary to conduct the land waters into the *Thames*, without which inundations would happen in the parishes. That in truth was a mere drain for the lands; it was of a private nature, and was not stated to be useful to the navigation of the *Thames*; and therefore the court thought that it was not within the statute 23 *Hen. 8.* But that is not like the present case; for here it is expressly stated that there was a navigation, and that it was essential for the support of it that the part above the dye-house should be cleansed. Then it is objected, where will the jurisdiction of the commissioners stop in such cases? The line may be drawn from this case, where it is stated that the party over whose land the work is done is or is likely to be benefited by it: if he is so, that is sufficient to give them jurisdiction.

GROSE, J.—declared himself of the same opinion; observing, that it appeared by the case that this was a common sewer; that it was useful to the navigation; and that the work done was beneficial to the public, and even to the plaintiff himself.

Postea to the defendant.

Friday,
April 18th.

STRATON *against* RASTALL and Another.

Where an annuity bond granted by two becomes void by the neglect of the grantee in not registering a memorial under the statute, he cannot recover back any part of the consideration money from the one who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it. A receipt is not *conclusive* evidence against the party who signs it.

THIS was an action of assumpsit for money had and received by the defendant (and one *William Avarne*, who was outlawed at the suit of the plaintiff) to the use of the plaintiff, and for money lent and paid; to which the defendant pleaded the general issue. At the trial at *Guildhall* at the Sittings after last *Michaelmas* Term, before *Buller, J.* a verdict for 425*l.* was found for the plaintiff, subject to the opinion of the court on a case stated.

In *October* 1780 one *Joseph Sharp* applied to the plaintiff, and informed him that the defendant and *Avarne* were desirous of granting an annuity of 100*l.* for their joint lives and the life of the survivor. The plaintiff agreed to become the purchaser for 575*l.* and the following deeds and writings were executed

by the defendant and *Avarne* to the plaintiff. A bond, dated 23d October 1780, in 1150 *l.* given by the defendant and *Avarne* for securing the payment of the annuity to the plaintiff. A warrant of attorney of the same date to enter up judgment on the bond. And also an indenture tripartite of the same date, between the defendant and *Avarne* of the first part, the plaintiff of the second part, and *George Johnstone* of the third part; whereby, after reciting the agreement for the purchase of the annuity, and also reciting that the plaintiff had advanced and paid 575 *l.* to the defendant and *Avarne* for the purchase of the said annuity, and that for the more effectually securing the payment thereof the defendant had agreed to subject the rents and profits of certain messuages, lands, &c. therein mentioned with the payment of the said annuity, it is witnessed, that in consideration of 575 *l.* so paid by the plaintiff to the defendant and *Avarne* for the purchase of the said annuity, the receipt of which the defendant and *Avarne* respectively acknowledged, the defendant did grant and demise unto *George Johnstone*, his executors, &c. certain lands and hereditaments therein mentioned for a term of 99 years, if the defendant should so long live, upon trust, in case default should be made in payment of the annuity, that *Johnstone* might receive the rents and profits of the premises, and apply the same for the benefit of the plaintiff in discharge of the annuity. The defendant and *Avarne* signed the following receipt on the back of the deed for the said 575 *l.* "Received the
 " day and year first within written, of and from the within
 " named *John Straton*, the sum of 575 *l.* being the consideration
 " money within mentioned to be by him paid to us, and for
 " which said sum we have also signed a like receipt upon the
 " back of another part of the within deed; we say received the
 " same, by us *Wm. Rastall, Wm. Avarne.*" Neither the bond, nor warrant of attorney, nor indenture, was inrolled within the time prescribed by the statute respecting the grants of life annuities, whereby the same became void. On the 12th of June 1787 the defendant filed a bill in chancery against the plaintiff, impeaching the grant of the annuity for want of consideration, and praying an injunction against further proceedings in the present action. On the 21st of June 1787 the plaintiff put in his answer to the bill, and, amongst other things, stated, that on the treaty for the annuity *Sharp*, whom the plaintiff had for some time before known and been acquainted with, on behalf of

1788.

STRATON
 against
 RASTALL.

1788.

STRATON
against
RASTALL.

the defendant and *Avarne* jointly, and not on the behalf of *Avarne* only, applied to the plaintiff to purchase the annuity, and asked him 600*l.* for the purchase thereof, but he would not give for the same more than 575*l.* which sum he agreed to advance, and *Sharp* agreed to take, for the annuity; and at the same time he purposed that the said several securities before mentioned should be executed by the defendant and *Avarne*; and in another part of his answer he admitted that he understood that the whole of the purchase money was intended to be applied to the use of *Avarne* only, and that the defendant was only a surety for *Avarne*, but did not know whether the whole was actually received by *Avarne* only. But he said he would not have purchased the annuity, or advanced the 575*l.* unless upon the security of the complainant, and of the assignment made by him. *John Willmer*, one of the subscribing witnesses to the said securities, and who was produced at the trial on the part of the plaintiff, proved that he did not see any money paid at the time of the signing and executing the same.

Baldwin for the plaintiff. The question is whether it does not sufficiently appear from the evidence in this case that the defendant has received money to the use of the plaintiff. His own receipt is an acknowledgement by him of the purchase-money having come into his hands; and nothing appears to the court to shew that he was not to be benefited by that sum, or at least that he was not to have a share of it. That receipt shews that he received it jointly with *Avarne*; and as between these parties it is conclusive against the defendant; whatever private agreement there might have been, as between the defendant and *Avarne*, concerning the division of the money, it is perfectly immaterial to this plaintiff. If indeed any distinction were to be made between the two former as to their responsibility, it rather shews that the defendant was the principal to whom the plaintiff looked; for it is stated that he would not have advanced the money but on the credit of the defendant, and it was the defendant who gave the security on his estate, and signed the receipt first: this is an estoppel to him.

Brough for the defendant. In order to maintain this action, it is necessary to prove that some consideration came to the defendant. But upon a review of the whole evidence that by no means appears: for though the receipt is strong presumptive evidence, yet it is not conclusive; and it is rebutted by another fact

fact by which it appears that the defendant did not actually receive any benefit from the money. The annuity act (a) directs that the consideration of every annuity, which shall be in money only, shall be particularly set forth in the memorial: in such case a receipt for so much money would not be conclusive evidence of the fact, but the party might still shew that part of the consideration was in goods. If then it really appears that no part of the consideration was received *bonâ fide* by the defendant for his own benefit, the case of *The Attorney General v. Randall* and others (b) will apply strongly to this case. There, though a receipt had been signed by three trustees, yet the chancellor decreed that the one only who had in fact received the money should be accountable for it. Therefore as it appears from the plaintiff's own answer that he looked on the defendant merely as a surety at the very time he advanced the money, this action cannot be maintained; because he was surety for the payment of an annuity, and not for the return of the whole or any part of the consideration money; and the annuity was avoided by the default of the plaintiff himself, and not by any act of the defendant.

1788.

STRATON
against
RASTALL.

Baldwin in reply. It appears that the application to the plaintiff to advance the money was made by the defendant himself as well as by *Avarne*. It was to those two to whom the money was paid; whatever therefore might be their relative situations, as to this plaintiff they are equally liable. The receipt is the only conclusive evidence which the court have before them to guide their judgment. As to the case of trustees acting without any benefit to themselves, between whom and the *cestui que trust* there is a privity, that goes on a very different principle; but here the plaintiff is a third party having no privity with the defendant and *Avarne*, and dealing on the joint security of both.

ASHHURST, J.—I think the plaintiff may maintain this action. For wherever a man has received money upon a consideration, which afterwards fails, that person from whom he received the money has a right to recover it back as money had and received to his use. Here the plaintiff has paid a sum of money on a consideration which has failed, and the only question is from whom he is entitled to recover it. I am of opinion that he is entitled to recover it either from the defendant and *Avarne*, or

(a) 17-G. 3. c. 26. s. 4.

(b) 2 Eq. Cas. Abr. 742.

from

1788.

STRATON
against
RASTALL.

from either of them. Indeed it appears from the whole of this transaction that the plaintiff had no confidence in *Avarne*, but relied wholly on the defendant. *Avarne* had no property; it was the defendant who gave the security. That being the case, and the consideration having failed, is the plaintiff deprived of his remedy against the defendant because he understood that the money was originally raised not for the use of the defendant, but for that of *Avarne* only? The plaintiff had nothing to do with any private agreement between the defendant and *Avarne*; he advanced the money entirely or principally on the credit of the defendant. If the plaintiff had been asked whether he would have trusted *Avarne* only, he would have said no; the receipt imports it. As between these parties, both the defendant and *Avarne* received the consideration money; and the plaintiff shall not now be permitted to aver against his receipt.

BULLER, J.—I am of opinion that the plaintiff cannot maintain this action against the defendant. It was clearly understood at the trial that *Avarne* in fact received the whole of the consideration money; and on this case it must be taken that the plaintiff was only a surety. I will first consider this as a question of strict law. On *Avarne's* proposing to raise a sum of money by way of annuity, offering the defendant as a surety, the plaintiff advanced the money upon the security of both for the payment of the annuity. Now on strict principles of law, if that contract become void by the act of the plaintiff, on what ground can he recover back that money; for the neglect of a plaintiff cannot raise a debt in a defendant. It formed no part of the contract; and if he can recover at all, it must be on equitable principles. But as against a surety, the contract cannot be carried beyond the strict letter of it. Then can the plaintiff recover against this defendant on equitable principles. Of late years this court has very properly extended the action for money had and received; it is founded on principles of justice, and I do not wish to restrain it in any respect. But it must be remembered that it was extended on the principle of its being considered like a bill in equity. And therefore, in order to recover money in this form of action, the party must shew that he has equity and conscience on his side, and that he could recover it in a court of equity. Then as to the equity in this case; it appears that the money was advanced for the use of *Avarne*, and that he only was benefited by it. But there is no equity in say-
ing

1788.

STRATON
against
RASTALL.

ing that a person, who has only lent his name by way of securing the payment of the annuity, shall be answerable for the consideration money of that annuity for which he has not pledged his security, and from which he has received no benefit whatever. Could the plaintiff recover this money against this defendant in a court of equity? The case which has been cited by the defendant's counsel is very strong to shew that he could not, and that equity distinguishes between the persons who join in a receipt and him who actually receives the money; and that the receipt is not conclusive against him, as he was only a surety and in fact received no part of the consideration money. In conscience, he only who received the money ought to be obliged to pay it back: and a court of equity would enquire in this case, whether the party had received the money or not. Now if a court of equity would give this plaintiff no relief, we ought not to permit him to recover in a court of law in an action founded upon equitable principles. So that whether this is considered as a question of strict law, or upon the equitable principles which have prevailed in actions for money had and received, I think the plaintiff is not entitled to recover.

GROSE, J.—desired to have further time to consider of his opinion; and on *Monday, April 21st*, he delivered it as follows. This is an action for money had and received. There has been no express promise made in this case; the action therefore, if it can be supported at all, must be founded on an implied one. The *prima facie* evidence of this is the receipt which was signed by the defendant jointly with *Avarne*, whereby they both acknowledged to have received the money. But this must be taken with all its concomitant circumstances; and from them it appears that the defendant, in consideration that the plaintiff would advance 575*l.* for the benefit of *Avarne*, undertook with *Avarne* to become surety, and did become surety, for the payment of an annuity of 100*l.*; and accordingly a bond was entered into by both to that effect. By the subsequent neglect of the plaintiff that bond is become of no use. But the plaintiff says that, under these circumstances, the law implies a promise by the defendant to repay the money advanced as money received to the plaintiff's use. But no case has been cited to shew that under such circumstances the law implies such a promise. And in reality the money is not received by the defendant to the use of the plaintiff, nor lent to the defendant; but advanced to

1788.

STRATON
against
RASTALL.

Avarne and the defendant for the benefit of *Avarne* in consideration of an annuity secured by bond to the plaintiff. Then it is neither money lent to be repaid, nor received for the use of the plaintiff. So that in strict law the evidence does not prove either count of the declaration. How stands the case then upon equitable principles. It appears plainly that in fact the defendant has had no benefit from this money. *Avarne* had the whole; then *Avarne* should be answerable for the whole. It is true that the defendant consented to become surety for *Avarne*, but he was surety for the payment of the annuity, and not for the repayment of the consideration money; and he entered into a security which the plaintiff has destroyed: but that raises no equity against the defendant who has received no benefit in favour of the plaintiff who is alone in fault. And therefore the action cannot be supported either upon legal or equitable grounds.

The Postea to be delivered to the defendant.

Friday,
April 18th.

LORD AMHERST against LORD SOMMERS and Others.

Stables rented by the colonel of a regiment by order of the crown for the use of the regiment, are not liable to be rated to the relief of the poor. The possessions of the crown or of the public are not rateable.

Ke. vol. 3. p.
519.

TRESPASS for taking the plaintiff's goods. Plea, the general issue. A case was reserved at the trial for the opinion of this court. On the 26th of July 1780, his majesty by his sign manual gave a warrant to Lord Robert Bertie, the then captain and colonel of the 2d troop of horse guards, reciting that it had been represented to his majesty that the term heretofore granted of the stables and riding-house, occupied by his said troop, would expire on the 24th June 1783; that the proprietors thereof would not agree to grant a further term; and that it would be for the benefit of his said troop to agree with *Abraham Adams* for the building of stables and a riding-house for the use of the said troop, and to take a lease of the same for forty years from the 24th June 1783, when the lease of the stables then occupied would expire, at the yearly rent of 339*l.* by which his majesty authorized Lord Robert Bertie to agree with *Adams* for the building of stables and a riding-house, and to accept and take a lease of such stables and riding-house, when completed and finished, for forty years from the 24th June 1783.

at the rent abovementioned, and to execute a counterpart of such lease, and directed that it should be binding upon Lord *Robert Bertie*, and the captain and colonel of his second troop of horse guards for the time being, during the said term. An agreement was accordingly entered into between Lord *Robert Bertie*, as captain and colonel of the second troop of horse guards, and *Adams*, for building the said stables, riding-house, offices, rooms, stalls, lofts, chambers, and apartments, (according to a plan then delivered,) in which agreement *Adams* covenanted to complete the buildings on or before the 1st of *June* 1783, fit for the reception of all and every the servants, grooms, hostlers, horses, and cattle, belonging to the said troop of horse guards. And the agreement contained all the usual covenants which were to be inserted in the lease. On the 10th of *March* 1782 Lord *Robert Bertie* died, and upon his decease the plaintiff was appointed the captain and colonel of the said troop. The stables, riding-house, and premises were finished, and the key thereof delivered by Mr. *Adams's* clerk to Lord *Amberst's* porter, and the horses of the said troop, except the horse of and belonging to the captain and colonel of the said troop, have ever since been and still are kept therein. No person resides constantly at the stables, nor is there any room or apartments fitted up in the same for the purpose of residing or dwelling therein. Two grooms are hired and paid by the purveyor to take care of the horses; each of whom in his turn sits up by night with two troopers as centinels. The only use made of the stables is to keep the troop horses with the accoutrements belonging to them, except the horse and accoutrements of and belonging to the captain and colonel of the said troop, which never have been kept at the said stables. The rent of the stables is paid by the agent of the troop, and is charged by him on all the troop (except the colonel, the chaplain, and the surgeon,) and is stopped out of their pay. The colonel appoints the agent, and displaces him at pleasure; and has the absolute direction of the regiment, and the funds of it. A certain sum is issued by government for each regiment, and paid whether the regiment be full or not. If the regiment be not full, the pay of such soldiers, as are wanting to complete it, goes to the colonel: but still the same stoppage is made out of each man's pay for the payment of the rent of the said stables, as when the regiment is full. The plaintiff was rated for the same stables, riding-house, and premises, being situate in the parish

1788.

Lord AM-
HERST
against
Lord SOM-
MERS.

1788.

Lord AM-
HERST
against
Lord SOM-
MERS.

parish of *St. Mary-le-bone, Middlesex*, for the relief of the poor of the said parish for the year 1786, at 13d in the pound, which according to the rent of 339*l.* amounted to 18*l.* 7*s.* 3*d.*; and this rate not being paid, two of the defendants, being justices of the peace for the county of *Middlesex*, granted a warrant of distress to the other defendant, the collector of the said rate, who went to the plaintiff's house under the said warrant, the same being first backed by a justice of the peace for the city and liberty of *Westminster*, and took the goods mentioned in the declaration.

Shepherd was to have argued for the plaintiff; but the Court desired

Fielding, for the defendant, to begin. The question is whether the plaintiff is rateable as the occupier of the stables in question. If the sign manual, which is stated in the case, had never been given, there is no doubt but that the plaintiff would be rateable as the lessee of *Adams*. Then does the sign manual vary the question? This, it was contended, could not have any reference to this case; for though the stables were contracted to be built under the king's order, yet the instant they were built the plaintiff must be considered as a mere lessee treating for the use of these stables. *Adams* the lessor is clearly in possession of an annual benefit, and the plaintiff is his tenant. If it be objected that this is a species of barracks, appropriated to the use of the public, and therefore that it is an exception to the general rule that every tenement is rateable; it is clearly distinguishable from such a case, for there no annual benefit results to the landlord: so in the case of an hospital or a charitable foundation. 2 *Burr.* 1053. But in the present case the landlord is benefited; he not only receives an annual benefit, but if the property be not the subject of a rate, he may encrease his rent. So that there is nothing here to distinguish it from the common case of landlord and tenant. And it must be taken on this state of the case that the rent is paid by the plaintiff; for though it passes through the hands of the agent of the regiment, yet he holds his place at the pleasure of the colonel, and is in fact a mere servant. It is indeed stated that this rent is paid by a deduction from the soldiers' wages; but the power which the colonel may have to deduct any part of the pay of the troop cannot vary the question as between the landlord and him; for he is responsible for the rent at all events.

ASHHURST,

ASHHURST, J.—It is admitted that neither the possessions of the crown, or of the public, are liable to be rated to the poor. Then must not the property in question be considered as falling within one or the other of those descriptions? It is clear that there is no actual occupation by the plaintiff, and that it is only used for the reception of the troopers' horses; neither can the persons who in turns work in the stables be said to be occupiers. It has been argued that every species of property, from which the landlord receives an annual income, is liable to be rated; because it must be presumed that the landlord lets it for so much the less under the idea of its being rated. But it may be said on the other hand, that where the property is in the possession of the crown, the rent is paid by the public; and though it is stated in this case that so much is deducted out of each man's pay for the accommodation of the horses, yet in order to enable them to pay that rent, the public allow them the greater pay: and were it not for that deduction, the public would give each man so much the less; so that eventually it is paid by the public. This property therefore must be considered as in the occupation of the public, and is not rateable to the poor.

BULLER, J.—The question is, whether the plaintiff is or is not the occupier of these premises. There is no case which is exactly applicable to the present. It has been contended that the plaintiff is the occupier, because he is the lessee of the stables. But it appears on this case that he did not contract as a general lessee; and it is material to consider the effect of the sign manual. It appears to us that the plaintiff acted merely for the benefit of the public, by order of the crown: he contracted by leave of the crown, and is like a trustee for the public, deriving no benefit whatever to himself from the contract. For if he had acted for his own benefit, there would have been no occasion for the sign manual. Besides, it appears that, in point of fact, so far from the colonel's making use of these stables, his horses have never stood there. So that in no point of view whatever can the plaintiff be considered as the occupier.

GROSE, J.—declared himself of the same opinion.

Postea to the plaintiff.

1788.

Lord AM-
HERST
against
Lord SOM-
MERS.

1788.

Friday,
April 18th.

HOARE and Another against PARKER.

A pawn-broker has no lien on plate after the death of a tenant for life, who pawned it with him, as against the remainder-man, altho' the pawnee had no notice of the settlement.

TROVER for plate by the plaintiffs, who claimed under a remainder-man, against the defendant, to whom it was pawned by the tenant for life. Admiral *Stewart* by will gave his plate to trustees for the use of his wife *durante viduitate*, requiring her to sign an inventory, which she did at the time the plate was delivered into her possession. She afterwards pawned it with the defendant for a valuable consideration, who had no notice of the settlement; and before the commencement of this action she died. A demand and refusal was proved. A special case was reserved before *Buller, J.* at the last Sittings at *Westminster*, stating these facts; and the question was, whether the defendant was bound to deliver up the plate without being paid the money he had advanced on it?

Baldwin, for the defendant, declared that he could not argue against so established a point (a).

Gibbs, for the plaintiff.

Per Curiam. This point is clearly established, and the law must remain as it is till the legislature think fit to provide that the possession of such chattels shall be a proof of ownership.

Postea to the plaintiffs.

(a) Vide 1 *Vern.* 407. 2 *Vern.* 691. *Hartop v. Hoare*, 3 *Atk.* 44. *Cadogan v. Kennet*, *Corwp.* 432. *Foley v. Burnell*, *Ibid.* 435. in the notes. 25 *Hen.* 6. 25.

Saturday,
April 19th.

The KING against The Inhabitants of SULGRAVE.

If a master and servant before *Michaelmas* agree for yearly wages,

and the master while he is taking money from his pocket to give earnest, tell him that *he shall be absent a fortnight at Michaelmas because of his settlement*, and that he will give him that time to get what he can, to which the servant assents, this is a mere dispensation with service for that time, and not such an exception out of the original contract as will make the hiring insufficient for the purpose of gaining a settlement.—The servant's apprehending that the master would not have hired him, if he had not agreed to the fortnight's absence, will not alter the case.

him

1788.

The KING
against
The Inhabi-
tants of
SULGRAVE.

him accordingly. On the *Friday* before old *Michaelmas* his master asked him if he would stay again; the pauper said he would, if they could agree about wages, and asked five guineas, which the master thought too much. The pauper immediately set out to go to a statute, and, having gone about ten yards, returned for some things he had forgotten. He then met his master again, who said he would give him the five guineas, and gave him one shilling earnest. The master, while he was putting his hand in his pocket for the shilling, said, you shall go away a fortnight at *Michaelmas*, because of your settlement; and I will give you that fortnight to get what you can: to which the pauper then agreed. The pauper accordingly went to his father's and staid a fortnight; during which time he worked for Mr. *Chester* in digging sand on Mr. *Howes'* land, and received from Mr. *Chester* one shilling a day; and once or twice during the fortnight he eat at Mr. *Howes'*. At the end of the fortnight he went to Mr. *Howes*, and continued to serve him at *Stouchbury* till *Lady-day*, when Mr. *Howes* removed, and the pauper with him, to *Culworth*. Mr. *Howes* soon after died, and the pauper continued to serve Mrs. *Howes* in *Culworth* till the time when he left her, and he then received his wages up to that time from a relation of Mrs. *Howes'*; and the pauper believes that there was nothing deducted for the fortnight; but he does not remember what sum he received. The pauper apprehended that his master would not have hired him, if he had not agreed to go away for the fortnight. This piece of evidence was objected to by the counsel for the appellants; but the court put the question.

The court of quarter sessions for *Buckinghamshire*, being of opinion that the pauper gained no settlement by his service with Mr. *Howes*, confirmed the order of justices, by which the pauper was removed from *Westbury* to *Sulgrave* in the county of *Northampton*.

Dayrell and *Lowndes*, in support of the order of sessions, contended that these two hirings and services could not be coupled together, so as to give the pauper a settlement in *Stouchbury*, because there was a chasm between those services for a fortnight. It is true indeed that some words of the agreement for the last year seem to imply that the fortnight was to be considered as part of the time for which the servant was hired: but as the whole conversation passed at the same time, the different parts
of

1788.

The KING
against
The Inhabi-
tants of
SULGRAVE.

of it must be taken as forming one contract; so that *before* the master gave the shilling as earnest, which is the period when the contract was completed, it was stipulated by both parties that the pauper should not come into his master's service till after the expiration of a fortnight. This agreement should have been more explicitly stated by the Sessions: but it may be sufficiently collected from the evidence, which they have returned, that these conversations between the master and the servant only formed different parts of the same contract: and though the case has artfully divided them, the court cannot but see that it was an entire agreement. This was not an absolute, but a conditional, hiring; it being expressly provided that the pauper should not enter into the master's service for a fortnight: it therefore was an exception out of the original contract, and thus defeats the settlement. This cannot be contended to be a dispensation with the fortnight's service on the part of the master, on the ground that the contract was before completed, which was obligatory on both parties, and therefore that it was not in the power of the master to except that time out of the original hiring; because, if the whole of this conversation be taken together, the latter part must be considered as an explanation of the former, and the agreement was not completed, or binding on either party, till the whole of it had passed. For it is to be observed that this was not an express hiring for a year; but only a general hiring, which the law construes into an hiring for a year, if nothing to the contrary appears: but as it only arises by presumption, it may be explained. In *The King v. St. Peter's in Dorchester* (a), lord Mansfield said, "An indefinite hiring is only an hiring for a year, where the nature of the service and subsequent facts concur to render it probable that it was so meant." But here it appears to have been the intention of the parties that this should not be such an hiring, and that the pauper should not gain a settlement by the service. It was competent to the parties to enter into such an agreement, even though it was expressly stated, as a reason, that the pauper should not gain a settlement by the service. This was so determined in *The King v. The Inhabitants of Mursley* (b). But farther, there is nothing inconsistent in saying, that after a hiring for a year, there may be an exception of part of it, which will defeat the settlement; as in *The King v. The*

(a) *Burr. S. C.* 543.(b) *Idr.*, 1 vol. 694.

Inhabitants of *Bishop's Hatfield* (a), where the pauper was hired for a year, with liberty to let himself for the harvest month to any other person. Then if, where the parties have expressly contracted for a whole year, they are afterwards at liberty to control it by excepting a part of it, surely in such a case as the present, where there is *no precise hiring* for a year, but where it is only to be *presumed* to be of such a nature, it may be explained by the parties at the time of entering into the contract. The cases of *The King* against The Inhabitants of *Buckland Denham* (b), and *The King* against The Inhabitants of *Empingbam* (c), were cited to shew that this agreement must be considered as making an exception in the original contract. It cannot be contended on the other side that this is a fraudulent contract, for fraud is not stated by the sessions; so that this court cannot go upon the ground of fraud (d). And indeed a contrary inference is to be drawn, for the sessions have stated that the pauper gained no settlement under the terms of this hiring, which was in effect considering it not as fraudulent. If the contract had been such that the master would have had the benefit of the service, and the exception out of the service had been used merely as a colour to prevent the servant's gaining a settlement, that might have afforded a reason for the sessions to adjudge the contract fraudulent. But in the present case, as the master was not only bound by the terms of the agreement to lose part of the pauper's service, but as he did, in fact, lose it, there is no room even for the imputation of fraud.

Erskine, and *Wilson*, *contra*, were stopped by the court.

ASHHURST, J.—The rule established in these kind of cases is this, where there is a *bonâ fide* exception of part of the time at the time of the hiring, that is not an hiring for a year: but if there be no exception at the time of making the original contract, then a permissive absence is considered as a dispensation of part of the service by the master; and it does not operate in the same way as an exception out of the original contract, which defeats the settlement. And the question, whether it be one or the other, must depend on the particular circumstances of each case. In this case there was a complete hiring for a year at the time. The parties having disagreed on the terms proposed, the pauper went away: but on his return his master said he would give him

1788.

The KING
against
The Inhabitants of
SULGRAVE.

(a) *Burr. S. C.* 439. (b) *Burr. S. C.* 694. (c) *Burr. S. C.* 791.
(d) *Stra.* 85. *Burr. S. C.* 166. 770.

1788.

The KING
against
The Inhabi-
tants of
SULGRAVE.

the five guineas, which he agreed to accept, and gave him one shilling earnest. It is likewise stated, that while the master was putting his hand into his pocket, he told the pauper he should go away for a fortnight. But the contract was complete before that time; and what passed afterwards can only be considered as a dispensation with the service. For at that time the master had a complete right to his service for a year, and the pauper had agreed to serve him for that time, and the one shilling earnest was to bind the agreement for a year for the five guineas; otherwise it appears to be giving the servant more than he originally asked for the whole year for serving him for a shorter period. If then the contract were complete before any thing was said relative to the fortnight's absence, this was a dispensation with the service, and not an exception out of the original contract. An exception is a stipulation on the part of the person for whose benefit it is introduced; but here it was not made on the request of the servant but on the offer of the master. And it appears that he said it was for the express purpose of preventing the pauper's gaining a settlement. That is not such a reason as the court would give much countenance to. Whether indeed the sessions might not have determined this on the ground of fraud was for their consideration. As it is, there is no occasion to go into that ground, as we are of opinion that this was a dispensation with the service. With respect to the servant's apprehension, which is stated in the case, that cannot vary the question: we are to decide on the terms of the contract, and not on the apprehension of the pauper.

BULLER, J. and GROSE, J.—Of the same opinion.

Rule absolute.

ROBINSON *against* HARDCASTLE and Others.

THE following certificate was sent to the lord chancellor in this case (a).

“ Having heard counsel on the case above referred to us, we are of opinion that *Elizabeth Robinson* did not take any estate or interest under the said indentures of lease and release, and settlement, of the 13th and 14th of July 1773, and the said will of the said *James Dunn*, her father, in that part of the estate at

(a) *Ante*, 241.

Great

Great Chilton, comprised in the said settlement, which lies on the east side of the post road leading from *Rusby Ford* to *Ferry Hill*.

1788.

ROBINSON
against
HARD-
CASTLE.

For what was done in this case on its return into Chancery, see 2. Bro. Ch. Rep. 344.

“ W. H. Ashburst,

“ F. Buller,

“ N. Grose.”

The KING *against* The COMMISSIONERS OF EXCISE.

Saturday,
April 19th.

THIS was a rule, calling on the commissioners of excise to shew cause why a mandamus should not be directed to them, commanding them to grant a permit (a) to *James Cadwallader Parker* for the removal of six pipes of wine from the vaults of *Parker* to the vaults of Messrs. *J. and L. Bateman*. The rule *Nisi* at first likewise ordered, “ that all proceedings to seize the said wines, as unentered stock in the hands of a dealer, be stayed in the mean time ;” but the court afterwards ordered it to be struck out, on the motion of the attorney general. It appeared by the affidavits that *Parker*, proposing to take up the business of a dealer in foreign wine, on the 15th of *June* 1787 gave orders for a parcel of wines from *Oporto*. On the 19th of *June* he purchased six pipes of port at a public sale of wines by auction ; to remove which to his vaults he regularly obtained a permit from the officer of excise. In *September* last he sold two pipes (his wine from *Oporto* not being then arrived), and in order to enable him to deliver them, he took out a licence (b), directed to be taken out by persons dealing in foreign wines, and made the entry (c) of the vaults, of which he gave notice to the excise office, requesting the officer to take an account of his stock. The officer refused to give credit for the wines in his cellar, though the permit was shewn to him, assigning as a reason, that the permit was dated before he had taken out his licence, or made an entry of his vaults. *Parker* swore that he did not intend to commence the business till the arrival of his wine from abroad ; and that he had no intention of defrauding the revenues.

A person, who intends to become a dealer in foreign wine, must take out his licence, and enter his warehouse, before he lays in his stock. A dealer in wine is not entitled to a permit to remove wine fold, which wine was laid in before he took out his licence.

The *Attorney General*, *Solicitor General*, *Bearcroft*, and *Wood*, shewed cause against the rule, insisting that *Parker* was not entitled to have the permit which he demanded, upon the true con-

(a) 26 Geo. 3. c. 59.

(b) s. 8.

(c) s. 12.

1788.

The King
against
The Com-
missioners of
Excise.

struction of this act of parliament. The eighth section enacts that no person shall *deal in or sell* foreign wine by wholesale without first taking out a licence. *Parker*, having introduced the wine in question into his cellar as a private person, though with a view of afterwards selling it, and having since taken out a licence, now demands a permit from the commissioners of excise to remove it from his vaults to the vaults of a purchaser. Therefore the only question is, at what time he commenced to be a dealer. They contended that he must be considered to be a dealer at the time when he bought the wine. For the act intended that all wine which should be brought into the cellar of a dealer should be brought in under the inspection of the excise officers; and the licence which is directed to be taken out by the merchant only extends to wine bought subsequent to it; for the act says that no person shall deal in or sell wine without *first* taking out a licence. And here it is admitted by the person who makes this application, that he laid in this wine in contemplation of becoming a dealer. The words in the act are in the disjunctive, deal in *or* sell; therefore the legislature clearly had in view a dealing without selling; so that *buying* in this instance with an intention of selling is within the meaning of the act. Besides, the commissioners of excise are called upon to certify that the duty on this wine has been paid (a), which they cannot know, as the wine was not laid in under the inspection of their officers. If this were not the true construction of the act, there would be a great opening to fraud; for a person intending to deal in wine would easily defraud the revenue of the duty on the wine, by saving any number of permits taken out by himself, and afterwards smuggling a quantity of wine to answer the amount of them. Now as these permits might be used a second time, the legislature foresaw that they would not be a sufficient check upon dealers, and therefore they required the excise officers to take an account of all wine to be brought into their cellars. For a permit relating to a *quantity* of wine brought in at one time is no proof that the duty on *the wine* which the dealer desires to remove at another has been paid; and unless the officers of excise actually know that the duty has been paid, they cannot grant the permit, which is now requested, certifying that such duty has been paid. But if there be any doubt on this part of the act, it is made clear by the general clause of reference.

(a) s. 30.

The

The fifty-fourth section enacts that all the powers, directions, rules, penalties, forfeitures, clauses, matters, and things, which in and by the 12 *Car.* 2. or by any other law now in force relating to the revenue of excise upon beer, ale, or other liquors, are provided for managing, recovering, adjudging, or ascertaining, the duties thereby granted, shall be practised and put in execution for managing, raising, recovering, and paying, the duties upon wine, &c. Now by the 12th section of the 6 *Geo.* 1. c. 21. persons who intend to become dealers in spirits are directed to make an entry of their warehouses *before* they take such spirits into their possession; and the 13th section enacts that no spirits shall be brought into such warehouses *without first giving notice thereof to the officers of excise*; therefore by incorporating that act of parliament with the present, which may be done by the clause of reference, it is manifest that *Parker* should have entered his warehouse before he laid in his wine, and that he should have given notice to the officer of his intention of laying it in.

Erskine and *Lane*, in support of the rule. The whole argument on the other side is founded on the idea that *Parker* was a dealer at the time he purchased the wine in question. But in order to prove that, it must be determined that the contemplation to become a dealer constitutes a dealer within this act. Now a *dealer* is a general word, comprehending *selling* as well as *buying*; or at least he must profess to sell. But here it is expressly sworn that *Parker* had no intention of selling before the arrival of his wine from abroad. If such is the common acceptance of the word, something must be shewn to prove that the legislature used it in a more enlarged sense in this statute: but there is no one instance in the act in which *dealing* means *buying only*; and if such had been the intention of the legislature, they would have used the word "buyer," and not "dealer." And the court will not put a different interpretation on the word from that in which it is used in general, as very severe forfeitures will attach upon it. *Buying* alone will not make the person buying a trader within the statutes relating to bankruptcy. No commission of bankrupt could be taken out against a person who only buys. A person may entertain the idea of becoming a dealer on some future contingency, such as the success of an adventure: but that act of the mind must afterwards be carried into execution; for if such contingency does not happen, the

1788.

The KING
against
The Commissioners of
EXCISE.

1788.

The KING
against
The Commissioners of
Excise.

party does not intend to become a dealer. Here the party actually becomes a dealer by taking out a licence; but it would be very unjust to subject him to all the penalties of the act before he takes out the licence; for if he ought to be considered as a dealer at the time he bought this wine, this very wine would be subject to condemnation, he not having taken out a licence at that time. And if the commissioners of excise had intended to dispute this question, they should have proceeded against *Parker* as for a forfeiture, if the mere act of buying makes him a dealer within the act. Under this act of parliament *Parker* was not bound to give notice to the excise officers when this stock was laid in. This is a *casus omissus* in the statute, which only requires dealers at the time when it passed to give notice within three days; but no provision whatever is made for those who were to become dealers after it passed. According to the construction contended for by the other side, if a quantity of wine came to a person as executor, he never could obtain a licence to sell that wine as a dealer. With respect to the general clause of reference, which it is contended incorporates the 6 Geo. I. c. 21. with it, that only refers to the powers given to magistrates, &c. of seizing the commodities, or to the manner of recovering or mitigating penalties; but it cannot apply to the particular regulations relative to each article on which a duty is imposed. The general clause of reference cannot supply any defect in the enacting part of this statute, so as to create a forfeiture. But even admitting that this general clause could refer to the former act in all particulars, still it leaves the question where it was before, for that act only applies to *dealers*. A difficulty has been raised, that the commissioners of excise cannot grant this permit, because they must thereby certify that the duty has been paid, which they cannot do, as the wine was not brought in under their inspection. But the permit sufficiently proves the payment of the duty; and the manner in which the officers are informed of such payment is immaterial. Besides, the words of the act are in the disjunctive, "expressing that the duty of such wine "has been paid, or that the same was part of the stock of some "dealer, of which an account has been delivered in at the office "of excise." Supposing however the court should be of opinion that the stock should have been brought in under the inspection of the officers of excise, still, as *Parker* has obtained a licence to deal in foreign wines, the commissioners of excise are bound to grant

grant a permit to remove his wine. Their office in this respect is merely ministerial, and they have no discretion. When *Parker* has removed this wine, if they are of opinion, under these circumstances, that it is forfeited, then the question will arise upon the construction of the act, whether *Parker* was bound to take out a licence before he bought the wine; but at present their opposition is premature. The question of fraud cannot arise in this case, as no fraud has been attempted to be imputed to the person making this application.

ASHHURST, J.—This act of parliament ought to receive such a liberal construction as will most probably remedy the inconveniences which were intended to be remedied by it. This is not a question whether *Parker* has incurred a forfeiture; but whether he is in such a situation as that the court ought to grant this *mandamus*. Now an application for a *mandamus* is an application to the discretion of the court; a *mandamus* is a prerogative writ, and is not a writ of right; therefore the court ought not to grant a *mandamus* to the commissioners of excise, unless they see that the officer has done wrong in refusing the permit. Now I do not think that he has done wrong in this case; as the wine in question was not brought into *Parker's* vaults in such a regular course as comes within the general purview of the act. It was the object of the act to prevent frauds; and it may be collected that it was not the intention of the legislature that any person should have a licence to sell wine, unless the officer of excise were satisfied that the wine was brought into his cellar in the regular way; for which reason it requires that the wine shall be brought in under his inspection. The eighth section of this act of parliament enacts “that no person shall “*deal in or sell* foreign wine by wholesale, without first “taking out a licence for that purpose.” For the purposes of this act I think a man does commence to be a dealer from the moment when he buys the wine with an intention to sell it again. I do not mean to say that he is so for every purpose; as for instance to subject him to the bankrupt laws, or to incur forfeitures: but for this purpose he does then become a dealer. On the true construction of this act of parliament I am of opinion that *Parker*, before he brought this wine into his cellars, should have complied with all the requisites which were intended as checks by the act: otherwise it would be an inlet to all those frauds against which the statute meant to guard,
and

1788.

The KING
against
The Com-
missioners of
Excise.

1788.

The KING
against
The Commissioners of
Excise.

and the act itself would be nugatory. The merchant must not only have regular permits for all the wine brought into his cellar; but the act intended to impose further restrictions on him, by requiring that the excise officer should have notice when the wine is to be brought in; otherwise the officer could not put into execution the checks imposed by this act, nor guard against any encrease of the stock. But this wine was brought into *Parker's* cellars several months before such notice. Therefore on the general view of this act, and the intention of it, it appears that this wine was not so regularly brought into his stock, as that the officer was bound to grant the permit required, recognizing it as part of the stock of a dealer in wine. Thus it stands independently of the general clause of reference to the former excise laws: but if it were necessary to call that in aid of the present question I think that it does incorporate the 6 Geo. 1. c. 21., *quoad hoc*, into this act of parliament; and that statute (a) enacts that no spirits shall be brought into the merchants' warehouses till they have been duly entered and notice thereof given to the officers of excise. But there is no occasion to have recourse to the former act; for the intention of the legislature appears sufficiently plain from the act in question.

BULLER, J.—The first question is what is meant by a *dealer* in this act of parliament? I am of opinion that according to the true construction of it a *buyer* is a dealer for this purpose. This bears no analogy to the case of bankrupts within the bankrupt laws; for there the words of the statutes (b) are “a person who seeks his living by *buying and selling*;” therefore to constitute a trader within those acts there must be both a buying and selling. But here the words are in the disjunctive, “deal in or sell;” and we cannot vary the meaning of them by construing them to be buying *and* selling; *dealing* must mean something which does not include selling. This act of parliament has three classes of persons in view; first, those who were traders before the passing of the act, on whom particular restrictions are added by the sixteenth section. But this does not fall within that description. Secondly, those who become dealers afterwards, upon whom the eighth section attaches. Thirdly, those who are not dealers, but who are possessed of a quantity of wine which they wish to dispose of; that is provided for by the tenth section. It is enacted by the eighth section, that no person shall

(a) S. 13.

(b) 13 El. c. 7. 21 Jac. 1. c. 19. s. 2.

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

3^o7

1788.

The King
against
The Commissioners of
Excise.

deal in or sell any wine without first taking out a licence; therefore any person who intends to become a dealer must, under this act, take out his licence before he does any act of dealing; and *buying* is an act of dealing. And here it appears that *Parker* did not take out his licence before he purchased the wine in question. The thirtieth section only applies to those who are duly licensed, that is duly licensed at the time of doing the first act of dealing, which is buying. This section requires the officer, who grants the permit, to certify one of three things; either that the duty has been paid; that the wine has been condemned; or that it is part of the stock of some dealer: but that stock only relates to the stock of those who were dealers before the passing of the act. In that case they have some rule to guide them; so if goods be condemned, the officers cannot mistake. But in the other case, it is strange to say that the officers shall be compelled to certify that to be true which they cannot know, unless the wine was brought in under their inspection: now that they would be enabled to do, if they had notice before it was brought in. With regard to the argument which has been drawn from the general clause of reference, which it is contended incorporates the statute of 6 Geo. 1. into this; as far as statutes are in *pari materia*, they may be taken into consideration together, as to the general provisions of the act: but I think there is a great deal of weight in the argument of the counsel in support of the rule as to the extent to which that doctrine is to be applied. But it is not necessary to determine that point in this case.

GROSE, J.—I have no doubt on the construction of this act of parliament. For if the prosecutor's construction were to prevail, it would open a door to so many palpable frauds, that the intention of the legislature would be entirely frustrated. The question is whether they meant that a dealer should or should not be permitted to send wine out of his cellars unless it has been regularly entered under the inspection of the excise officers. I am clearly of opinion that he has no such right in any case. There are two classes of persons entitled to permits under this act; dealers, and those who are not so. As to the dealers, the thirtieth section shews in what manner permits are to be granted to them, requiring the certificate of the excise officer that the duty has been paid. Now it is not possible that the officer can certify that fact, unless the wine be brought in

1788.

The King
against
The Commissioners of
Excise.

under his inspection. It has been asked in the course of the argument at what time a man commences to be a dealer: I think that, for the purposes of this act, he must be considered to be a dealer when he purchases the wine and brings it into his cellar; for the act undoubtedly means that the person shall make his entry before he has the wine in his possession for the purpose of sale.

Rule discharged.

Saturday,
April 19th.

Lord LONSDALE and Others against CHURCH.

see 6. Durnf. & East 303. 1. East 430.

In an action on a bond, damages may be recovered for more than the amount of the penalty. *But see 1. East 303.* In debt on bond with condition to account for money to be received; the court will not stay proceedings upon paying the penalty into court, because damages may be recovered beyond that amount.

*See Lee
Ten & Winter-
ton 3. Bro.
Cha. Cas. 409
& Knight v.
Maclean
ibid. 426.
4. East
Crease v.
Hunter
2. Ves. Jun.
157. & 4.
Bro. Cha.
last same
page.*

THE defendant, on being appointed receiver of the harbour dues of *Whitehaven* by the plaintiffs, who were trustees for carrying into execution several acts of parliament relating to that harbour, entered into three bonds of two thousand pounds each, conditioned to account to the plaintiffs for all sums so received by him. The defendant, on being called upon by the trustees to account, admitted that he had 5400*l.* in his hands; but the trustees, conceiving that he had received interest for several parts of that sum, filed a bill in equity to compel a discovery; and having in the mean time brought three several actions against him on these bonds, the defendant obtained a rule calling on the plaintiffs to shew cause why the proceedings in two of the actions should not be stayed on payment of the two penalties into court; and why it should not be referred to the master to see what was due to the plaintiffs for principal upon the other bond, and why on payment of what the master should think due, together with costs to be taxed, all further proceedings should not also be stayed in that third action.

Wood now shewed cause against the rule, insisting that the court could not stay the proceedings in the actions on these bonds because the statute 4 *Ann. c. 16.* did not extend to them. The 12th and 13th sections of that act only relate to bonds conditioned for the payment of a lesser sum at a day or place certain; but these bonds are neither conditioned for the payment of any precise sum, nor on a day certain. This application is intended to get rid of interest, and to defeat the effect of the bill in equity.

Chambre,

1788.

Lord Lons-
dale
against
Church.

for his *damages*, by reason of the *detention*; and, on a writ of error being afterwards brought, it was held that such damages might be assessed. And in *Dewall v. Price (a)*, debt was brought on a bond, with a penalty of 140*l.*; a bill was filed in chancery; and it was referred to a master to compute the principal, interest, and costs, who computed the principal and interest at 154*l.* and the costs at 67*l.* and on appeal this was held well in *Dom.*

+ But note that
the debt was paid
in equity.

Proc. +

The Court however said, that, as there appeared to be some hardship in the defendant's case, they would let him pay the penalty in the two actions into court, but they would not stay the proceedings; and then, if the plaintiffs chose to proceed further, they would do it at the risk of a jury's not giving more than the amount of those respective penalties.

Whether voluntary
payments might be
received in part of
penalty of judgment
on bond, & same was
to compute payment
see *Brownley v. Child*
before L. Hardwicke in
Chanc. 21. Oct. 1745.
Lodr. M. P. R. vol. 5. p.
103. See also *110.*
509. 50.
Lodr. M. P. R. vol. 4. p. 110.

Chambre, however, said, that this rule might be discharged, and he would move to pay the money into court, as a motion of course; which was permitted.

(a) *Show. P. C.* 15.

Saturday,
April 19th.

KERNOT and Another *against* NORMAN.

The court
will not dis-
charge a de-
fendant out
of custody on
filing com-
mon bail on
the ground
that he has
become in-
fane since the arrest.

BURROUGH moved to discharge the defendant out of custody on filing common bail, on an affidavit which stated that he had become insane since the arrest. But

The Court said that a similar application had been rejected some few years ago after argument.

Rule refused.

Saturday,
April 19th.

STADHOLME, Executor, *against* HODGSON.

After a de-
fendant has
obtained an
order for time
to plead on
the terms of
pleading is-
suably, he
cannot plead
the statute of
limitations or
any other
plea which
does not go to the merits.

THIS action was brought on three promissory notes drawn by the defendant, payable to the testator, and dated in 1775. The defendant, after having obtained an order for time to plead on the terms of pleading issuably, pleaded *non assumpsit*, a set-off, and the statute of limitations.

Chambre moved to set aside the last of these pleas, because it was not competent to the defendant to plead any plea which did not go to the merits.

And if he plead such a plea, the court will set it aside on motion.

Lowndes

Lowndes shewed cause on an affidavit, which stated that the defendant, as well as his attorney, lived in *Cumberland*, where the venue was laid. That the declaration was filed in the office on the return day of the writ, and notice of its being filed conditionally was delivered to the defendant in *Cumberland* on the same day, indorsed to plead in eight days. And he contended that, as it was absolutely impossible, on account of the distance, to procure instructions within the eight days, the plea, under these circumstances, ought to be allowed. But

The Court said, that the reason for rejecting the plea of the statute of limitations after time to plead was, that it excluded the merits, and when the defendant asked a favour of the court, it was under the express condition of pleading to the merits only. That the rule was positive, and could not be dispensed with in any instance.

Rule absolute.

DUBERLEY *against* PAGE and Another.

Monday,
April 21st.

TRESPASS for breaking and entering a close, lately part of a waste in the manor. The defendants pleaded not guilty, and also several justifications; one, under a right of common, to which the plaintiff replied a right of approving in the the lord, leaving a sufficiency of common; another, under a right of digging sand or gravel upon the waste, which was traversed by the replication. The defendants also pleaded a custom within the manor, that if any person has been desirous to approve or enclose any part of the waste of the manor, obtaining the consent and licence of the lord, he might be presented by the homage of the court baron at a general court; and if the homage thought that such enclosure would be of no prejudice to any of the tenants, &c. of the manor, it hath been the custom to present that such person, so obtaining the consent and licence of the lord, might enclose the said parcel of the said waste, and a fine or rent hath been set on such person by the homage; the plea then stated that the homage had not presented any such person, &c. Replication, that the lord had a right to enclose

If one of several pleas pleaded by defendant be adjudged bad on a demurrer to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted from the costs taxed for the defendant upon the postea, if afterwards upon trial of the issues joined on the other pleas the defendant

should have a verdict; even though it should appear

on the whole of the record that the plaintiff had no cause of action. The lord has no right under the statute of *Merton* to enclose and approve the wastes of a manor where the tenants of the manor have a right to dig gravel on the wastes, or to take estovers there.

1788. *the said parcel under the statute of Merton, and did approve the same, there being left common sufficient for all persons having a right, &c. To this the defendants demurred severally, and joinder by the plaintiff. Judgment was given for the plaintiff on the demurrers (a); and afterwards the cause went to trial on the several issues which had been taken. And the issues relating to the defendants' prescriptive right to dig gravel and sand being found for them, the jury were discharged from giving any verdict on the other issues, on the ground that the lord could not enclose under the statute of Merton against such a right, or any right of estovers. The master taxed the defendants' costs on the postea, but did not allow them the costs of the demurrers.*

*Dumault
against
the lord.*

Wood, on the part of the plaintiff, now moved that the master might tax the plaintiff the costs occasioned by the demurrers, and that the amount of such taxed costs might be deducted out of the costs allowed to the defendants on the postea. And he contended that under the 4 *Ann. c. 16.* the plaintiff was entitled to the costs of the demurrer which had been adjudged for him, notwithstanding the defendants were entitled to judgment on the whole record. The 4th sect. of that statute allows to the party defending the liberty of pleading double; but the 5th sect. provides, that, if such matter shall on demurrer joined be adjudged insufficient, costs shall be allowed at the discretion of the court. If this had been a demurrer to the plea directly, there is no doubt but that the plaintiff would now have been entitled to the costs of that demurrer; and it is immaterial

(a) This question was argued *Easter Term*, 27th *Geo. 3d.* by *Le Blanc*, in support of the demurrer. The other side was stopped by the court.

ASHURST, J.—The right of the lord of the manor in this case is a common law right, and not dependant upon any custom. Every custom must be construed according to the subject matter of it. Here it is only applicable to the tenants of the manor. It gives them a right of enclosing under certain restrictions, which they would not otherwise have been entitled to do at all. But the right here exercised by the lord is superior to the custom, and derived from the common law.

BULMER, J.—These customs are in favor of the tenants of the manor, but by no

means abridge the common law right of the lord. For by the common law he alone had a right to enclose, and this privilege has been extended to the tenants under certain restrictions; and in this instance, the previous steps necessary to be taken were intended as a benefit to the lord, and not as a restraint on him; for before any person can enclose or take any steps towards it, he must first obtain the consent of the lord. The words are "any person being desirous of inclosing, may apply to the court, &c. first obtaining the consent of the Lord." Therefore in no instance can the tenant enclose without such consent.

GROSE, J.—Was of the same opinion. Judgment for Plaintiff.

whether the plea be adjudged ill on demurrer to it in the first instance, or on demurrer to the replication; for the words of the statute are general, *on demurrer joined*. The case of *Greenbow v. Ilfley* (a) is precisely in point to this. The only difference between the circumstances of the two cases is, that there the plaintiff was nonsuited at the trial, instead of having a verdict obtained against him. There, after great consultation, the costs of the demurrer which had been adjudged for him were allowed, and ordered to be deducted out of the costs allowed to the defendant. And though that case was in the common pleas, yet it is equally strong as an authority in this court, because it was not a mere matter of practice, but a general question arising on the construction of the statute of *Anne*, and decided by the opinion of all the judges.

Erskine, and *Partington*, opposed the rule in the first instance, insisting that as it appeared on the whole of the record, that the plaintiff had no cause of action, he was not entitled to have any costs deducted. The defendants were clearly entitled to a general judgment on the record, for though in fact only one issue was tried, which was on the right to dig sand and gravel, yet that being found for the defendants, was decisive against the right set up by the lord to enclose, and there was no occasion to enter upon the other issues. In *Cook v. Sayer* (b), where the plaintiff demurred to one of two pleas, and obtained a verdict on the trial of the other; and afterwards there was judgment for the defendant on arguing the demurrer; on a question as to the costs, Lord *Mansfield* said, that, it appearing on the whole that the plaintiff had no cause of action, he ought not to have the costs, although he had obtained a verdict; and that as the demurrer went to the gist of the action he had acted unadvisedly in going down to trial first. Now, though the circumstances are reversed in this case, yet the reasoning applies equally strong. For here it appears upon the whole record that the plaintiff has no cause of action; and as the point on which the demurrer turned was totally collateral to the merits and gist of the cause, the plaintiff has unnecessarily incurred that expence by arguing it before the trial; for if he had waited till afterwards, the arguing of the demurrer would have been nugatory. The court are not bound by the statute of *Anne* to allow the plaintiff his costs on the demurrer. They have a discretion which goes to all the costs as well as to

1788.

Demurrer
against
Page.

(a) *Barnes* 136.(b) 1 *Burr.* 753.

1788.

Demurrer
against
Plaintiff

the *quantum*; such a discretionary power as a judge at *nisi prius* has of granting a certificate under the same section of the act. If, therefore, the court are not absolutely bound to grant the plaintiff the costs of the demurrer, they will not be enclined to do it in this instance, as it now appears that he had no cause of action.

(a) BULLER, J.—This verdict proceeded on the ground which the defendants' counsel has stated; but the question now is, whether under the statute of *Anne* the plaintiff has a right to the costs of the demurrers which were adjudged in his favour. Before this act of parliament only one plea could be pleaded, when records were of course less expensive than they are at present. The meaning of the legislature in passing that act was, that though they would grant an indulgence to a defendant, by permitting him to plead several pleas, yet it should not be prejudicial to the plaintiff; and therefore the costs of double pleadings are by the statute left in the discretion of the court. Then it is material to consider, whether, under this clause of the act, the *quantum* of the costs only is left to the discretion of the court, or whether a discretion is vested in them whether they will or will not allow *any costs at all*. I am of opinion that on this clause the plaintiff is entitled to costs, and that the *quantum* only is in the discretion of the court. The form of entering the judgment for costs in all cases states it to be by the discretion of the court, but that is only as to the *quantum*. With regard to the latter part of this clause, if a verdict had been found for the plaintiff on the issues, *prima facie* he would have been entitled to costs: and I have never known any instance of a judge at *nisi prius* certifying in favour of the party pleading double, when the issues on those pleadings are found against him; for it is but just that the party who has created that expence should pay it. Then it is said that the plaintiff should not have argued the demurrer till after the issues had been tried, in order to avoid the expence of the demurrer; but that argument is not well founded, because an expence is immediately incurred by the pleadings. The plaintiff had a right to argue the demurrer either before or after the trial; I have always thought that it is better to argue it before the trial, because a demurrer may put an end to the whole. This falls very much

(a) ASHHURST, J. came into court while the counsel were arguing this case.

within the reasoning in the case of *Dodd* and *Joddrell* (a), which was argued in the last Term, where the defendant in replevin was allowed the costs of the issues found for him out of the general costs of the verdict, though some issues were found for the plaintiff which entitled him to judgment. There the court reasoned on the plea itself, holding every thing afterwards to be consequent upon it. In the present case the demurrer was in consequence of the bad plea pleaded by the defendants; and as the plaintiff had judgment on that plea, he is likewise entitled to the costs of it.

1788.

DUBERLEY
against
PAGE.

GROSE, J.—I agree with my brother *Buller* that our discretion on this act of parliament only relates to the *quantum* of the costs which the party is entitled to. In this case it is highly fit that the costs of this bad pleading should fall on the person who was the cause of that pleading; otherwise it would be right to correct the mode of pleading as many pleas as the party chooses. This double pleading is not allowed as of course in the court of Common Pleas, where they refuse their assent to particular pleas which they think are vexatious. As to the objection that the plaintiff should not have argued the demurrer before the trial, the answer which has been given to it is decisive; for if the plea be good, it may put an end to the suit, and thus may be the means of saving expence. On the true construction therefore of this statute, I think that our discretion is confined to the quantum of the costs; and that the plaintiff, who has obtained a judgment on the demurrer, is entitled to the costs of this plea.

Rule absolute.

(a) *Ante*, 235.

The KING *against* ALICE STUBBS and Others.

Monday,
April 21st.

ALICE Stubbs, widow, *Thomas Miles*, and *Jonathan Keeling*, who were described to be substantial householders, were, on the 6th of *October* 1787, appointed overseers of the poor for the township of the monastery of *Renton Abbey*, in the county of *Stafford*, for one year next ensuing the date thereof. On appeal

A woman may be appointed an overseer of the poor. Where a district contains only three houses, the

inhabitants of all three may be appointed overseers of the poor, notwithstanding two of them are labourers, and poor.—Appointment of overseers, dated in *October*, for a year next ensuing the date, is good, because it shall be understood to be the overseers' year.

1788.

The King
against
Stubbs.

to the Sessions, this appointment was confirmed, subject to the opinion of this court on the following case. The township of the monastery of *Ranton Abbey* is an extra-parochial place, containing three houses only, and about four or five hundred acres of land. Those three houses are respectively occupied by the appellants. Mrs. *Stubbs* lives in the *Abbey-house*, and occupies the greatest part of the land within the township. The house occupied by *Miles* is a small house, which he rents with something more than an acre of land belonging to it: he has lived in it two or three years, with a wife and two children, and is poor, and a servant to Mrs. *Stubbs*. *Keeling* is a labourer, and poor; but the house in which he lives, with four or five rood of land belonging to it, is his own property.

Leycester obtained a rule to shew cause why the order of sessions should not be quashed, on two (a) grounds; first, because one of the persons appointed was a woman, who was incompetent to serve the office of overseer of the poor; and, secondly, because there was a want of ability in the other two persons; it being stated in the case that they were poor, and therefore they did not come within the description of the act of parliament, namely, *substantial householders*.

Plumer, *Syer*, and *Legh*, now shewed cause. In answer to the first objection: As no peculiar objection is stated against the appointment of the present defendant, the objection must be taken to be a general one, that a woman cannot in any case be appointed an overseer of the poor, and that she is by law exempted from serving such an office. The statute 43 *Eliz. c. 2.* mentions *substantial householders*, which in terms comprehends the present defendant, because *substantial householder* has no reference to sex. So that females are not entitled to any exemption from any thing that appears in the act itself; neither must there necessarily be any implied exemption in the statute from any analogy to the exemption of women from serving other offices. First, there is no necessary incapacity arising barely from a consideration of the sex, which disqualifies a woman from executing this office. And, secondly, even if there were some parts of the duty

(a) An objection was likewise taken to the form of the appointment, by which the defendants were, on the 6th of October, appointed overseers for the year next ensuing the date thereof: but, though the court thought last term that the objection was fatal, be-

cause it exceeded the time mentioned in the 43 *Eliz.* they now over-ruled it on the authority of the case of *R. v. Sparrow, Bott. 11.* as it might be taken to mean only the overseers' year.

of overseer which a woman could not execute in person, she may appoint a deputy. As to the first; the principal duties of the office consist in collecting the poor rates in the parish, in settling the parish accounts, and in providing work for the poor; all of which may be performed by a female. A woman is capable of serving almost all the offices in the kingdom (a), such as those of queen, marshal, great chamberlain, and constable of *England* (b), the champion of *England*, commissioner of sewers (c), governor of a workhouse (d), sexton (e), keeper of the prison of the *Gatehouse* of the dean and chapter of *Westminster* (f), returning officer for members of parliament (g), and constable (b), the latter of which is in some respects judicial. It is well known too that the office of gaoler is frequently executed by a woman. But, secondly, if a woman could not execute in person every part of the office of an overseer of the poor, she may appoint a deputy. It may perhaps be objected to this, that the power of appointing a deputy is confined to ministerial offices only, and that this is not of that description. But there is no foundation for any such objection; for it can only hold in cases where the office is strictly judicial, such as that of the lord chancellor, or of one of the judges of *England*; where the duty consists in an original exercise of office, not in obeying the mandate of another. It does not follow that every act is judicial, because the person doing it exercises his judgment on it. In *Medhurst v. Waite* (i), where it was necessary to consider how far a high constable could appoint a deputy for the purpose of billeting soldiers under the mutiny act, Lord *Mansfield*, in considering what was or was not a judicial act, said, "It is taking the definition too large to say that "every act, where the judgment "is at all exercised, is a judicial act." A judicial act is supposed to be done *pendente lite*, of some sort or other." Now the office of overseer of the poor does not fall within the rule, for there is no instance in which an overseer is called upon to hear and determine any matter in the course of the office in a judicial character. The office of overseer is *wholly ministerial*, for

1788.

The KING
against
STUBBS.

(a) *Ann* countess of *Pembroke*, *Dorset*, and *Montgomery*, had the office of hereditary sheriff of *Westmoreland*, and exercised it in person. At the assizes at *Appleby* she sat with the judges on the bench. *Hargr. n. Co. Lit.* 326. a.

(b) *Dy.* 285. b.

(c) *Gallis*, 252, 3.

(d) 2 *Lord Raym.* 1014.

(e) 2 *Str.* 1114. 13 *Vin. Abr.* 159.

(f) 3 *Keb.* 32. cited in 2 *Str.* 1115.

(g) *Ib.*

(b) 2 *Hawk. P. C. c.* 10. f. 36.

(i) 3 *Burr.* 1262.

he

1788.

The KING
against
STUBBS.

he acts in almost all instances under the control and direction of justices of the peace. But even though there were some instances in which he acts on his own judgment, that will not take away this power of appointing a deputy. For an office, which is *principally ministerial*, though in *some particulars judicial*, may be executed by deputy. All the arguments which can be urged against an overseer of the poor appointing a deputy, would equally apply against a constable's appointing one. But in *R. v. Clarke (a)* it was determined that a constable might appoint a deputy, not for this or that particular purpose, but for all the purposes of the office. And yet the office of constable has a great deal of original authority, such as that of interfering in all affrays happening in his presence. And the case in which it was decided that a high constable has the power of appointing a deputy was one in which the judgment and discretion of the officer are to be exercised, namely, the case of billeting soldiers. In *2 Hawk. P. C. c. 10. §. 37.* it is said that a custom to serve the office of constable by rotation is good, notwithstanding "it may come to a woman's turn, since in such case she may procure another to serve for her." With respect to the case of *R. v. Chardstock (b)*, where *Powell, J.* declared that "a woman was not to be an overseer of the poor;" it is to be observed that this was an *obiter dictum*, and extra-judicial. There two persons, a man and a woman, were elected overseers, and on the justices appointing the man, and refusing to appoint the woman, a mandamus was applied for to compel the justices to nominate two householders. *Parker, Ch. J.* said, "The parish here was obstinate in not having another instead of the woman, and the justices should have nominated one of the old ones;" and the court directed an application to be made to the justices to have another appointed, and, if they refused, then to apply for a mandamus: but no mandamus was afterwards applied for. So that that case only amounts to this, that it is improper to nominate a woman, when there are other persons who are more competent to serve the office; and it was not there decided that a woman could not be appointed. In *R. v. Gayer (c)*, where an acting justice of the peace had been appointed overseer, which appointment the sessions quashed, stating (*inter alia*) that there were other sufficient substantial householders within the parish; Lord

(a) *Ante*, 1 vol. 679.(b) 16 *Vin. Abr.* 415.(c) 1 *Burr.* 245.

Mansfield said, "The sessions, upon an appeal, have a right to exercise the same latitude of discretion, in judging "who are fit to be nominated overseers," as the two justices had. They have given their opinion that Mr. *Gayer* was not a proper person to be appointed overseer. There was no necessity to appoint Mr. *Gayer*; the sessions state that there were other sufficient substantial householders within the parish." There the court confirmed the discretionary power of the justices in vacating the appointment of *Gayer*, not because he was exempted, but because there was no necessity to appoint him. From whence it is to be inferred that, if it had been necessary, the appointment would have been proper. Now in this case there does appear to be that necessity; for it is stated that there are only three persons within the district; of whom *Alice Stubbs* is the most substantial, and therefore the most proper person to be appointed. If it be objected that there is no case in which it has been determined that a woman may be appointed an overseer of the poor; it is equally true that there is no case in which such an appointment has been quashed. And it is the constant practice for women to serve this office, particularly in this county, when a case of necessity exists. Besides, in this particular case there is a further reason for confirming this appointment: it appears that the place in question is an extra-parochial district, and is liable to maintain its own poor (*a*); but there can be no removal of any pauper till overseers are appointed. Therefore the consequence of determining that neither of these three persons, who are the only householders in this district, is liable to serve the office of overseer of the poor, will be to exempt the place from maintaining its own poor. As to the second objection, respecting the want of ability in the two men, it must be taken to be a relative ability; and when the statute speaks of "substantial householders," it must be qualified according to the place for which the overseers are appointed. Considerable property in a small village may be very inconsiderable in a large town; but if the district for which the overseers are appointed be small, large property is not an indispensable qualification in the persons to be appointed. The word "substantial" in the act does not mean wealthy or opulent; the legislature did not intend to say that, if there were no persons of wealth or opulence

1788.

The KING
against
STUBBS.

(a) Vide *R. v. Inhabitants of Ronton Abbey*, ante, 207.

1788.

The KING
against
STUBBS.

in a parish, there should be no overseers of the poor at all in that parish. As therefore there were not any persons in this district *more substantial* than the defendants, they are *sufficiently substantial* within the meaning of this act of parliament. For it is stated that one of the defendants occupies three or four hundred acres of land, and the other two have some property of their own; so that no danger is to be apprehended from their appointment, the object of the act being answered by the appointment of responsible persons.

Leycester, contra, in support of the first objection, contended, first, that a woman was not personally competent to discharge the duties of the office of overseer of the poor; secondly, neither could she appoint a deputy; but, thirdly, even if she could, it does not follow that she is compellable to serve the office by deputy. First, the question of incompetency is not to be decided by the peculiar circumstances of any particular district: but the question is a general one; and to determine that the woman may serve the office of overseer in this district will be to establish the competency of women to serve this office in every place in the kingdom. It is no answer to the objection of incompetency to say that females are included in the general terms in the act, "substantial householders"; for they equally comprehend ideots and lunatics. But it never could have been the intention of the legislature to compel women to serve the office of overseer of the poor; for there are some parts of the duty of that office which are inconsistent with the decency of the sex. It is the province of overseers to make all enquiries relative to bastards, and to carry the persons charged before a magistrate for the purpose of obtaining an order of bastardy, which, at a tender age may be prejudicial to the morals, and inconsistent with the decency, of females. Neither have they strength of body, or knowledge, equal to the duties of the station; it is their duty to make assessments for the relief of the poor, to set a value on property, to provide materials with which the poor are to be set to work, and to make enquiries, and take examinations, relative to the settlement of the poor. And if a woman be incompetent to discharge these duties, which are necessarily incident to the office, it is to the prejudice of the parish that she should be appointed, since their business must be neglected. It has been said that in point of fact there are several instances of women having served this office in this county; but no instance is

stated in the case; and no determination has been cited to shew the validity of such an appointment. But even admitting that two or three instances could be produced in which women had served the office, their acquiescence would not establish the liability of females to serve it. With respect to all the instances in which women have served other offices; no argument whatever can be drawn from them to shew that a woman is competent to serve this office, there not being the least similarity between the nature of the respective offices. As to the queen of *England*, it is sufficient to say that of all other stations there is not one perhaps which requires less personal exertion than this. And it was even doubted whether the regal office in this kingdom was hereditary in a female, in consequence of which the statute 1 *M. st.* 3. c. 2. was passed, purposely to declare that a female was capable of inheriting. The reason why a female may hold the office of constable of *England* is *because she may appoint a deputy* (a): now that reason is an admission that if she could not appoint a deputy, she could not hold the office. The same reason is given why Lady *Russel* might hold the office of the custody of the castle of *Dunnington*, because the office was granted to be exercised *per se vel deputatum suum*, *Cro. Jac.* 18. So the offices of great chamberlain, marshal, and champion of *England*, are hereditary; they are granted to a man and his heirs. With respect to the instance of a commissioner of sewers; it is merely the opinion of *Callis*, for which he gives the absurd reason, that *Semiramis* governed *Syria*. As to the case of the sexton (b), which is said to be only a private office of trust, to take care of the church, &c. and therefore a woman may serve it; it is also said there that if there were any thing to be done by the sexton, not proper for a woman, it would be otherwise. With respect to the case of the constable, it is only the opinion of serjeant *Hawkins*, that a custom to serve by rotation is good, because he thought that a woman might procure a deputy; now this admits that she cannot serve in person; and if she cannot serve by deputy, the custom could not be supported. In answer to these cases it is not necessary to consider how far they are authorities to shew that in certain cases a woman may appoint a deputy but for this part of the argument it is sufficient if they prove the incompetency of females to serve those offices in per-

1788.

The KING
against
STUBBS.(a) *Dy.* 285. b.(b) 13 *Vin. Abr.* 159, 2 *Str.* 1114.

1788.

The KING
against
STUEBS.

son (a). Wherever it is said that a woman may hold any particular office, it is either because the office is ministerial, or because tho' party judicial it is hereditary, and then she may appoint a deputy. So a woman, who is a forester in fee, cannot execute the office herself; but she may appoint a deputy (b), the office being ministerial (c). The incompetency of women extends to a variety of cases; they cannot serve on juries; vote for members of parliament (d); nor sit in parliament themselves. Then as to this office in particular, the case in 16 *Vin. Abr.* 415. is decisive to shew that a woman is incompetent to serve it. There a woman was rejected as unfit, and *Powell, J.* said "a woman cannot be an overseer of the poor: and there can be no custom of the parish to appoint her, because it is an office created by act of parliament." And the authority of this case stands uncontradicted. Secondly, An officer, who acts merely ministerially, may appoint a deputy, but a judicial officer cannot (e); neither can a deputy be appointed where the office is (strictly speaking) neither ministerial or judicial, but an office of trust and discretion; and the office of overseer of the poor is of that description. It is said in *Bro. Abr. tit. Deputie, pl. 9.*—*tit. Graunt, pl. 108.*—*tit. Patent, pl. 66.* and *Sir W. Jones* 113. that an office of trust cannot be assigned; neither can it be executed by deputy, unless power be expressly given for that purpose, *Co. Lit. f. 379.* A steward cannot appoint a deputy, without power, 9 *Co.* 48. Nor the clerk of the papers, *Freem.* 429. The office of high constable of *England* is expressly granted to be exercised by himself, or his sufficient deputy (f). And the offices of earl marshal, great chamberlain, and the champion of *England*, are hereditary; they are to the grantees and their heirs; so that according to the terms of those grants power is given to appoint a deputy. All the offices mentioned on the other side (except one) are either ministerial, or hereditary; in both which cases a deputy may be ap-

(a) In *Colt and Another v. The Bishop of Coventry and Litchfield*, *Hob.* 148. *Hobart Ch. J.* said, "a woman cannot be a pastor by the law of God: and it is against the law of the realm. For *beneficium non datur nisi propter officium*; and it is no reply that the cure may be served by a curate for them. For the question is not how they can make a curate, but how themselves are capable. And therefore in 5 *E.* 3, 4. *Bro. Abr. Patents*, 108. 9 *E.* 46. and 4 & 5 *P. & M. Dyer* 150. If an office of learning be given

to a man utterly insufficient, it is utterly void; and though it be to him and his assigns, or to be exercised by his sufficient deputy, it mends not the case; but it must radically vest in the first grantee, before it can go in title of procurator, or deputation to any other."

(b) 4 *Inst.* 311.

(c) 4 *Inst.* 293.

(d) 4 *Inst.* 5.

(e) 1 *Ro. Rep.* 274.

(f) 4 *Inst.* 128. *Dy.* 285. b.

pointed.

pointed. The instance indeed of a constable's appointing a deputy, if it be law, forms an exception to the general rule. But it is much to be doubted whether that has ever been solemnly determined. The case of *Phelps v. Winchcombe* (a) is the foundation of all the other cases upon this point. There an action of false imprisonment was brought against a deputy constable, and it became a question whether a constable could appoint a deputy. It was adjourned over, and no judgment was given upon it afterwards (b); and the argument seems to have proceeded on the ground of custom. And though this case was cited in the argument in 1 *Sid.* 355., the court were not agreed whether a constable could or could not appoint a deputy. Serjeant *Hawkins* *P. C. c. 10. s. 36.* says, "Inasmuch as the office of constable is wholly ministerial, and no way judicial, it seems that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself. Yet I do not find it settled that a constable can make a deputy without some such special cause. So in the case in *Burr.* 1259. it was not considered as a settled point that a constable could appoint a deputy to execute all the duties of the office; but the court thought that for the particular purpose then in question, which was merely ministerial, he might. And in the case of *The King v. Clarke* it was taken for granted without considering whether or no it had ever been decided. In *Cra. Car.* 389. where an attorney, who had been elected tythingman of *Taunton* under a custom that every person should be constable or tithingman according to their several houses, brought his writ of privilege to be discharged; "the court held the custom bad; for then a woman being an inhabitant in one of the houses, it may come to her course "to be constable, which the law will not permit." But, at all events, even if it were established that a constable could appoint a deputy, that single instance would not outweigh all the others. And it would not follow that an overseer of the poor could appoint a deputy, because a constable might, for the latter office

1788.

The King
against
Stubbs.

(a) 3 *Bulstr.* 77.

(b) In the report of this case in *Bulstr.* it is said at the end of the case "the whole court agreed herein in opinion in both points against the plaintiff, but no judgment was given, the same for this time being adjourned, and was never moved again, but ended

(as I heard) by agreement between the parties, perceiving which way the court inclined in their opinion, namely against the plaintiff." In the report of the same case in *Mo.* 845. it is said that the court agreed that a constable might appoint a deputy.

1788.

The KING
against
STUBBS.

is ministerial, and the former an office of trust and discretion; since he is to exercise a judgment on the propriety of relieving the poor, to punish the idle, to make assessments, and to have the application of them. There is likewise another distinction between the offices of constable and overseer; the former is a common law officer, and his deputy may be sworn in as principal: but an overseer is created by virtue of an act of parliament, which gives no power to appoint a deputy. And if it were allowed to an overseer to appoint a deputy, the statute, which with great caution expressly requires substantial householders to be appointed, would be evaded; for the principal might then appoint a deputy, who may not perhaps be a substantial person. And though the principal in such case might be held answerable for the money, that would not obviate the mischiefs arising from an improper exercise of discretion. But exclusively of any inference which is to be drawn from this act of parliament, the legislature themselves thought that an overseer could not appoint a deputy; for it is enacted by 1 W. & M. c. 18. that dissenters, who may be chosen overseers, may appoint deputies. This provision of the statute therefore was nugatory, if without it every overseer could appoint a deputy; and it is decisive to shew that the legislature considered that this is the only instance in which an overseer can appoint a deputy. Thirdly, It does not follow that, though a woman *may* appoint a deputy overseer of the poor, she herself shall be appointed the principal, and shall be *compellable* to appoint a deputy, 2 Inst. 34. If she be competent to serve the office herself, it would be making her responsible for the acts of her deputy, when she as principal is not liable to be placed in such a station of responsibility. In *Stone's* case (a) a writ of privilege was granted to exempt *Stone* from being reeve of the lord of the manor of *Harrow*, he being an attorney; and though it was there objected that he might execute the office by deputy, yet the court said that was no answer, because he was responsible for his deputy. So in *Abdy's* case (b), who was elected constable in *Essex*, under a custom to serve by rotation, notwithstanding he was an alderman of *London*, the court granted a writ of privilege; and the same objection, that he might execute it by deputy, was over-ruled. A writ of privilege was also granted to the vicar of *Dartford* (c) against serving the office of expeditor

(a) 1 Lev. 265.

(b) Cro. Car. 585.

(c) 2 Str. 1107.

to the commissioners of sewers; though it was insisted that it was an office which might be executed by deputy. All this doctrine is recognized in 2 *Hawk. P. C. c. 10. s. 39*. No case has been cited to shew that a person is compellable to accept an office, merely because he may appoint a deputy; in the instances cited of the great chamberlain, earl marshal, constable of *England*, and champion of *England*, who have the power of appointing deputies, it is only said that they *may*, not that they must, appoint them. And there are profits and emoluments annexed to those offices, which would make it desirable to the principals to be able to appoint a deputy. But no argument can be drawn from any particular instances of offices of dignity, or which are lucrative, and where the principal is desirous of appointing a deputy, to shew that in other cases where the office is not of that description the principal shall be compelled to accept the office and appoint a deputy, he being incompetent to execute it in person. Now this is a burthen some office, and therefore the authorities apply stronger in its favour: besides to compel an incompetent or privileged person to appoint a deputy, would be to destroy all privileges and exemptions whatever; and yet there are many cases in which exemptions have been actually allowed.

Secondly, The statute 43 *Eliz.* requires that the persons to be appointed overseers of the poor shall be substantial householders; and as they can only be appointed by virtue of this act, it must be strictly pursued. In *R. v. Sberingbrook (a)*, and *R. v. Great Marlow (b)*, the orders were quashed because it did not appear that the persons appointed were substantial householders. In *R. v. The Overseers of Weobly (c)*, the order was quashed because the persons appointed were described to be *principal inhabitants* instead of *substantial householders*. Then if it be necessary to state it in the order, it is necessary to prove it, or at least it should not be negatived. Therefore even though "substantial" were a relative term, that will not assist the prosecutor in this case, because it is expressly stated that these two men are poor persons. It may perhaps be difficult to define what is substantial within this act; but it is sufficient to say that in this case these persons are stated *not to be* substantial. And the office of overseer of the poor is of great importance; great

1788.

The King
against
Stubbs.(a) 2 *Lord Raym.* 1394.(b) *Bott.* 1.(c) 2 *Str.* 1261.

1788.

The KING
against
STUBBS.

trust is reposed in him; and therefore the statute requires that he should be of substance and responsibility.

Cur. adv. vult.

ASHHURST, J.—now delivered the opinion of the court.

Three objections have been made; 1st, To the form of the appointment of overseers, it being made on the 6th of *October*, by which the overseers are appointed for one whole year from the date thereof. 2dly, That one of the persons appointed was a *woman*, who, as such, could not legally be appointed to such an office. 3dly, That the other two were not *substantial householders*, and therefore could not legally be appointed. As to the first objection, it was disposed of in the course of the argument; it being determined in the case of *The King v. Sparrow, Bot. 11.* that such appointment is good. As to the second objection, we think that the circumstance of one of the persons appointed being a woman does not vitiate the appointment. The only qualification required by 43 *Eliz.* is that they shall be *substantial householders*; it has no reference to sex. The only question then is, whether there is any thing in the nature of the office that should make women incompetent; and we think there is not. There are many instances where, in offices of a higher nature, they are held not be disqualified; as in the case of the office of high chamberlain, high constable, and marshal; and that of a common constable, which is both an office of trust, and likewise, in a degree, judicial. So in the case of the office of sexton. As to the case in *Kin. tit. Poor, 415.* that is no conclusive authority. It is to be collected from the case that there were other persons in the parish proper to serve; and if so, the court held the justices had not acted improperly in refusing to approve of a woman; where there are a sufficient number of men qualified to serve the office, they are certainly more proper; but that is not the case here; and therefore, if there is no absolute incapacity, it is proper in this instance from the necessity of the case. And there is no danger of making it a general practice; for as the justices are invested with a discretionary power of approbation, it is not likely that they will approve of such an appointment when there are other proper objects. As to the third objection, with respect to the other two persons appointed, we think there is no foundation for it in this instance. The word *substantial* is a relative term. If there were a great many opulent farmers, there the appointment of a day-labourer might

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be improper; but here there were no other persons to serve. They are both householders with some land annexed to their houses, and one of them a proprietor. No better persons can be had than the place affords; and the want of them is no reason why the poor should not be provided for. Therefore we are all of opinion that the appointment ought to be allowed, and the order of sessions confirmed.

1788.

The KING
against
STUBBS.

DA COSTA against NEWNHAM.

Monday,
April 21st.

THIS action was brought against one of the underwriters of a ship from *Leghorn* to *London*, with liberty to touch at *Nice*; and tried under a consolidation rule; and at the trial before *Buller, J.* at the Sittings after last Term at *Guildhall*, the jury found a verdict of 62*l.* 19*s.* which, together with 17*l.* 10*s.* paid into court by the defendant, they calculated as the average loss *per cent.* which the plaintiff was entitled to under the circumstances of the case. On a motion for a new trial, *Buller, J.* reported the facts to be, that the ship insured met with an accident in the course of her voyage from *Leghorn* to *London*, and was obliged to put into *Nice* to repair. Advice thereof was transmitted to the owner (the plaintiff) and that it was necessary to unload the vessel, and that a considerable expence must be incurred. This account was communicated by him to the underwriters, at the same time that he expressed his desire to abandon: an altercation arose between them upon this subject; he being desirous of abandoning altogether, and they insisting upon the vessel's being repaired, and telling him to pay the tradesmens' bills. He consented at last, however, that the repairs should be done, but refused to advance any money; in consequence of which, it became necessary to take up a large sum on a bottomry bond, which was accordingly done. Before the repairs were begun the crew were discharged, and several of them afterwards hired at different times at so much *per diem* to assist in the work. The ship was refitted, and resumed her voyage, and gained freight afterwards. When she arrived at her port of discharge, application was made to the underwriters to take up the respondentia bond, which they refused to do; and therefore the vessel

Where repairs are ordered by the underwriters, for the payment of which a bottomry bond is given, and they refuse to pay it on the arrival of the ship, in consequence of which the ship is sold, they are liable for all the damage which accrues to the owner in consequence of that refusal. Where a ship has been repaired, the underwriters are not entitled to the usual deduction of one third, new for old, unless the ship has been put into the free possession of the owner again.

Where a ship is obliged to put into port for the benefit of the whole concern, the charges of

loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average.

1788.

DA COSTA
against
NEWMHAM.

was obliged to be sold in order to satisfy that debt; so that she never was in the free possession of the plaintiff again. The amount of the respondentia bond, together with the interest due, was 678*l.* and the ship sold for 600 guineas. Under these circumstances, *Buller*, J. stated that it had been agreed at the trial, and he had so stated it to the jury, that there had not been a total loss at *Nice*; for though the plaintiff had offered and was entitled to abandon, yet in truth he had not abandoned. Then considering it only as an average loss, the question was, whether the underwriters should be liable for the full amount of the insurance. The bottomry bond was only 600 *l.* but the ship never came free into the plaintiff's hands; for in consequence of the refusal of the underwriters to discharge it, she was obliged to be sold. He thought that as for all the subsequent injury which had accrued to the plaintiff in consequence of that refusal, and by which the plaintiff was damnified to the whole amount of the insurance, the underwriters were liable, because it was their own fault in not taking up the bond for the expences of those repairs which had been incurred by their own express directions. Then the only remaining question was, how the average should be calculated. As to that, he said that four or five different methods had been delivered in to him, which were then in court; one of these was a paper delivered in by the defendant, which he should at once lay out of the question; for in that, one third of the sum charged for repairs was taken off, which was the usual sum allowed in respect of *new work for old*. Now this was never allowed unless the ship got into the possession of the owner again; for the usage in that case was founded upon the idea that the owner got the ship the better for the repairs; therefore that rule did not apply in this case. As to another article respecting freight; there is no doubt but that the freight must contribute to the general average.

The grounds on which the rule had been obtained were, that in the account of the charges and expences incurred at *Nice*, and for which the bottomry bond had been given, there were many articles for which the underwriters on the *ship* were not liable, such as the charges for wages and provisions, shipping and unshipping the cargo, warehouse room, taking care of the cargo, &c.; that besides, at the time of the accident there was above 300 *l.* due for freight, no part of which was applied to

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

these purposes, which would have superseded the necessity of taking up so large a sum on respondentia. And again, that no allowance had been made for thirds in the repairs, which the underwriters were entitled to by the usage of trade. And also upon an affidavit that the amount of the goods had been undervalued.

Erskine, Mingay, and Baldwin, shewed cause against the rule. There is no doubt but the plaintiff was entitled to abandon at *Nice*, upon the principle laid down by Lord *Mansfield*, in *Hamilton v. Mendez* (a). For the underwriters refused to advance any money for the repairs which they insisted should be made. The plaintiff however waved that right, and complied with their requisitions to repair; and the necessary expences were defrayed by raising money on a respondentia bond. These charges then must be considered as having been incurred by the orders of the underwriters; they made themselves therefore liable for them. But when the ship came home, and the bond was tendered for payment, they refused to advance the money; in consequence of which, she was obliged to be sold for the benefit of the bondholders, and nothing ever came into the plaintiff's hands. By these means he has suffered a loss to the full amount of the insurance, which the defendants are liable to make good, inasmuch as it happened in consequence of their own act in not discharging that bond debt which they subjected themselves to when they directed the repairs to be made. By the same reason they were also liable to pay the charge for interest. And as to the objection that the underwriters were not liable to pay more of the debt than had been incurred in the repairs of the ship alone, supposing it to have any weight, it is answered by saying that they did not offer to discharge any part of the demand, for which by their own account they were liable. But besides, it will appear that in calculating the average the jury have given the plaintiff less by 10 per cent. than he is entitled to; for they have given the defendants credit for the freight which the plaintiff has received, and which they certainly are not entitled to. The defendants were not the insurers of the freight. It is well known that that is a distinct object of insurance. The ship is frequently insured by one, the freight by another. Here the plaintiff's standing his own insurer for the freight cannot vary the case. Suppose the owner of a ship which is chartered

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1788.

DA COSTA
against
NEWNHAM.

(a) 2 Burr. 1209.

insures,

1788.

DA COSTA
against
NEWMAN.

insures, and there is an average loss, the underwriter could not debit the owner in respect of the freight, for the person to whom the ship is chartered would alone be entitled to that. This charge not deducted would have entitled the plaintiff to 10 *per cent.* more than the jury have given him. The only deductions which the underwriters are entitled to are certain expences which were incurred at *Nice*, and which become general average, and consequently they are only liable for their proportion. Allowing then the defendants to deduct the general average on the freight, and on the goods, still the plaintiff would, in strictness, be entitled to 10 *per cent.* more than the verdict gives him. This will more than counterbalance any trifling errors in the account; the principal of which in the paper delivered in is that the goods have been undervalued, and consequently the general average would amount to more than is allowed; now even taking it on the defendant's statement, it only makes a difference of 2*l.* 10*s.* *per cent.* Another objection made is, that they have not been allowed the third for repairs. But it is a decisive answer to say that the ship never came free to the plaintiff's hands, and consequently he never had the benefit of them, which is the only ground on which the usage stands. The only remaining objection is as to the extraordinary wages to the men during the time the ship was repairing for working thereon. Now it is said that these persons were mostly the ship's crew, who were bound to contribute their assistance to the repairs, without any such extraordinary allowance. But the fact is otherwise: At the time the repairs were going on many of the persons indeed who had served on board the ship were hired, but it was in the capacity of labourers and not of sailors; for the crew had been all discharged on the arrival of the ship at *Nice*.

Bearcroft, and *Law*, *contra*, after noticing that, this cause having been tried under a consolidation rule, the court would of course grant a new trial, unless the verdict appeared in every point of view perfectly satisfactory to them, said there are three questions; 1st. What was the particular average or loss on the ship. 2^{dly}. What was the general average which falls on ship goods and freight, in their several proportions, according to the value of each. 3^{dly}. What those expences amount to which must be borne by the underwriters on the ship. 1st. There were many articles in the account on which the verdict was given, with which the defendant, as an underwriter on the ship, had no concern.

concern. Two of the principal of these are wages and provisions. These, it is said, ought to be considered as particular average on the ship, because they were expended for the use of the workmen who were employed in repairing her. But many of those were men belonging to the ship's company, and appear to be such on the log-book, who were bound by law to contribute their assistance to the repairs without any extraordinary allowance; and some of these expences were incurred before the cargo was discharged. Now the owners were bound to defray all expences of that sort; an underwriter on the ship has no concern with wages or provisions (a); he only insures the body of the ship with the tackle and furniture. There are several smaller articles brought into the account of particular average on the ship which do not belong to it. Pilotage is only a general average expence; and the charges of cooperage and warehouse-rent for the goods are not even subjects of general, much less of particular, average on the ship. And as to the item of sails, unless it had appeared that they were split or cut by any of the perils of the sea, these underwriters are not liable; for they are not to make good wear and tear loss. Then it is objected that, even supposing that the underwriters were not liable for these articles, yet that the defendant did not tender his proportion of the *respondentia* bond. But the defendant could not be bound by law to make a tender of that which he had no means of ascertaining the amount of at the time, and no demand was proved on this defendant. Besides these objections to the account, the underwriters are also entitled to allowances which have not been made to them. The principal of these is the one third for repairs, *new for old*. The usage in that case has been truly stated to be founded on the advantage derived to the owner. To which it is objected here that the owner did not retain possession of the ship, and therefore did not reap any such advantage. But still he has had the benefit of them, if the ship sold for more on account of those repairs, which it must have done. But at any rate, whether or not the defendant was entitled to this allowance was a question for the jury, as it depended upon a usage. As to the freight, the underwriters are clearly entitled to it; for if they are to answer as for a total loss in the event, they are also entitled to the usual advantages; and in such cases the underwriter is substituted in

1788.

DA COSTA
against
NEWNHAM.

(a) Vide *Robertson v. Ewer*, ante, 1 vol. 132. and the case of *Eden v. Court and Another*, there cited.

1788.

DA COSTA
against
NEWHAM.

the place of the assured; otherwise this would be a total loss without benefit of salvage. Upon the whole, if the court are of opinion with the defendant on the two principal points, as to the one third for repairs, and the wages and provisions, then the defendant will have paid into court more than sufficient to cover the plaintiff's demand, and therefore he is entitled to a new trial.

ASHHURST, J.—This cause having been tried under a consolidation rule, if the court entertained any doubt of the propriety of the verdict, they would grant a new trial. But I find no reason for thinking that the jury have given too much in the manner in which they have estimated the plaintiff's loss. They have found that he is entitled under all the circumstances to receive the whole value of the ship. I do not take it under the technical term of *total loss*. The question then turns on a matter of calculation, how much the defendant is bound to contribute. 1st. As to the freight claimed by the defendant; he was the insurer of the ship, and not of the freight; and therefore there is no ground for making a reduction of the freight before the ship got to *Nice*. At that period the plaintiff might have abandoned if he pleased; for the ship was then in a situation not worth repairing, and that was notified to the underwriters; but he did not abandon as he might have done; and upon their insisting that the vessel should be repaired, he undertook the management of it; but that was at the risk of the underwriters. The plaintiff had declared that he would not advance any money; and therefore the captain was obliged to raise money on hypothecation. The ship was put into the best repair she was capable of, and afterwards proceeded to *London*. On her arrival the bond was tendered for payment to the underwriters, but they refused to discharge it; in consequence of which the ship was obliged to be sold; and that put the owner into the same situation as if he had originally abandoned at *Nice*, and made it a total loss. And now the underwriters contend that they are entitled to the allowance of one third for the repairs. That indeed is the rule where a ship is repaired, and delivered over to the owner again for his benefit; in such cases it is right that such an allowance should be made, upon the ground which has been stated, that the owner is put in a better situation than he was before, by having new work for old. But here, as the plaintiff never has been put into free possession again
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of the ship, and that through the default of the underwriters, he cannot be said to have had any benefit from the repairs, and therefore he is not bound to make that allowance. As to the charge for the sailor's work, had they remained *as such* on board the ship, it would be fair that a deduction should be made; but it appears that the crew were discharged immediately on the ship's coming into port. And there is no reason why they should not afterwards be employed as labourers in making the repairs as well as any others. They did not work as sailors, but as common workmen; and therefore the plaintiff was entitled to make that charge. As to the sails, it does not appear in what situation they were; and no objection was made at the trial. The cooperage indeed may be a disputable article, but the charge is very trifling; and indeed it appears that the jury, so far from giving more than they ought, have given less than the plaintiff was entitled to by 10 *per cent.* which may be set off against the article respecting the cooperage; and then I do not think that the jury have given too much.

BULLER, J.—The question is, whether the jury have given too much. That depends on what the opinion of the court is upon the operation of the *respondentia* bond in this case. That is the substantial point, and it is a new one. When the accident happened, the plaintiff communicated the circumstances to the underwriters; he laid an account before them of the situation of every thing, and expressed a desire to abandon. They objected to it; they said let the vessel be repaired, and we will pay the tradesmens' bills; the plaintiff refused to advance any money, but relinquished, at their desire, his intention of abandoning. On this evidence I have no difficulty in giving it as my opinion that the repairs were undertaken at the risk of the underwriters, and they were answerable for all subsequent losses. The ship was repaired, and the necessary expences defrayed by raising money on a *respondentia* bond. Then the ship never was in the free possession of the plaintiff from that time: she came home subject to that onus. If the underwriters had discharged it, and thereby restored the vessel to the owner, they might then have demanded the usual allowance of one third, new for old. But they refused to do so; in consequence of which the ship was obliged to be sold, and therefore through their neglect there has been in effect a total loss to the plaintiff. Considering the ship then as lost through their means, the deductions which they claim

out

1788.

DA COSTA
against
NEWHAM.

1788.

DA COSTA
against
NEWHAM.

out of the expences incurred at *Nice* for general average must be proved by them. There was no proportion agreed on at the time they directed the repairs. They were bound, in the first instance, to pay the whole amount of the bond. This is not like the case put of a total loss without benefit of salvage, for the plaintiff agrees to allow that. Nor is it like the case where there is an election in the party to abandon or not, where that election must be made either one way or the other; for here, by the consent of the underwriters, the plaintiff has steered a middle course. They pointed out to him what he should do, and they must abide by the consequences of their interference. As to its not appearing that any specific demand was made upon the defendant for his share, it would be monstrous to require that the particular proportion of each individual should be separately demanded, when they are all acting as a body: a demand upon any of them with that view was sufficient.

Then the case is reduced to a mere question of damages. 1st. As to the one third for repairs, I have already given it as my opinion, that the underwriters were not entitled to it, because the plaintiff never had the ship again. 2dly. As to the wages and provisions; this is not like the case where a ship is detained by an embargo, where the court have said that the expence shall fall on the owner only, and the freight must bear it; but this is a question of general average, the ship having been obliged to go into port for the general benefit of the whole concern. A passage from *Beawes* is mentioned in *Park* 143, shewing the law in foreign countries upon this subject; that when a ship is forced by a storm to enter into a port to repair the damage she has suffered, if she cannot continue her voyage without an apparent risk of being lost, in such case the wages and victuals of the crew are brought into an average from the day it was resolved to seek a port to refit the vessel to the day of her departing from it, with all the charges of loading, unloading, anchorage, pilotage, and every other expence incurred by this necessity. But I do not know that this point has ever been settled in *England*: there is one case mentioned in the same book (a), where Lord *Mansfield* seemed to approve of this rule: but it is not necessary to determine that point now; for it ap-

(a) *Park*, 142.

pears that the crew had been all discharged, and these men were only employed as common workmen. As to the difference in the value of the goods as it is now stated, that only makes a difference of two and an half *per cent.* which is not a sufficient ground for a new trial, inasmuch as it appears that the verdict has been taken for 10 *per cent.* less than the plaintiff is entitled to. On the whole I am of opinion that this rule should be discharged, 1st. because, under the interference and directions of the underwriters, and their subsequent conduct in refusing to pay the bottomry bond, they are liable for all the damage which has happened to the plaintiff; and 2dly. because this is a question of general average, and the ship goods and freight should all contribute their several proportions.

GROSE, J. was of the same opinion on all the points.

Rule discharged.

REVELL and Others *against* JODRELL.

AN issue was directed under an inclosure act, 26 Geo. 3. c. 57 (a). to try whether the allotments made to copyholders, in respect of their copyholds, on two commons called *Belperward* and *Chevinward*, were freehold or copyhold. The cause was tried at the last Summer assizes for *Warwickshire*, when a verdict was taken for the plaintiffs by consent, the parties intending to take the opinion of this court upon a motion for a new trial: but by the direction of the court the facts were put into the form of a special case; which stated the act of parliament, reciting that disputes had arisen between the defendant, as lord of the manors of *Duffield & Belper*, in the county of *Derby*, where the commons in question lie, and the plaintiffs, copyholders of the said manors, respecting the tenure under which the inclosed lands would be holden by them, and directing the question to be tried in a feigned issue. The case also stated that on the 25th September 1629. 4 Car. 1. the king granted to *Edward Titchfield* and Others, and their heirs, &c. the manors of *Duffield* and *Belper* with all their rights, &c. except [*inter alia*] *always and altogether reserved* unto the king, his heirs, and successors, all and singular *forests, and chases, and all parks, &c.* Un-

der operation of law, but must have been demised or demiseable by copy time out of mind.

(a) Private Act.

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der

1788.

DA COSTA
against
NEWNHAM.

Friday,
April 25th.

By a grant of a manor with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom. And after a grant of the soil of those wastes to trustees for the use of the copyholders in free-socage, the lands when inclosed will be freehold and not copyhold. A copyhold cannot be created by

1788.

REVELL
against
JODELL.

der those grantees the defendant is well entitled to the above-mentioned manors. In the 6th of *Car. 1.* an information was filed by the attorney general in the duchy court of *Lancaster* against the Earl of *Newcastle* and Others, stating that the king was seised of the forest or chase of *Duffield* of which these wards were part, and was desirous to approve, but that the defendants claimed some estate or common therein: The defendants in their answers admitted the king's seisin of the land, and disclaimed all interest therein but rights of common as appendant or appurtenant to their copyholds in the manors of *Duffield* and *Belper*, for all cattle, &c. levant and couchant; and that these wards had been parcel of the manor of *Duffield* till the time of the grant abovementioned. On the 27th *March*, 6 *Car. 1.* a commission issued to treat with the defendants in that information, and it was mutually agreed that the king should have one third part of those wards in severalty, and the commoners the other two third parts. In consequence of which, on 21st *November*, 9 *Car. 1.* a decree was made in the said cause, reciting the information, and commission, &c.; And it was decreed that the king should have one third part of the said wards discharged of all rights of common, &c. and that the commoners, in lieu of their common which they had formerly enjoyed upon the whole of the said wards, should have, hold, and enjoy, for ever the other two parts of the said wards to them and their heirs; and all cottages and buildings upon the same, together with the soil of all the highways leading through the same, leaving free passage, &c. at and under certain yearly fee farm rents, therein expressed; and that his majesty should not from thenceforth have or claim any right, title, or interest, to the said two parts of the said wards, saving such rents. And it was further decreed that the soil of the said two parts of each several ward should be granted with all convenient speed to *John Osborne* and Others, &c. and their heirs, for the use and benefit of the said commoners, and their heirs, in fee farm and free socage, as of his majesty's manor of *Enfield*, in the county of *Middlesex*. And, reciting likewise that the king had signified his design to his chancellor to grant to *Edward Sydenham*, esq; his third part of the said wards in fee farm, it was further decreed that upon such grant there should be paid the reserved rent of 40 s. in the proportion therein specified. Accordingly on the 2d *September*, 10 *Car. 1.* The king by letters patent granted the said two parts to

to the trustees and their heirs as had been decreed. In 1670, 22 & 23 Car. 2. a private act was passed, entitled an act for settling an agreement between Sir *William Smith*, and Sir *Thomas Hooke*, and *German Pole* and others, which, after reciting that Sir *William Smith* and Sir *Thomas Hooke* were seised in moieties in fee simple of 1350 acres in these wards, being parcel of the manor of *Duffield*, &c. and that certain copyholders and freeholders having right of common, &c. a decree had passed [as before] and reciting that disputes had arisen between the said Sir *William Smith*, *John Fell*, from whom Sir *Thomas Hooke* claimed, *German Pole* and other commoners, concerning the said commonage, and that the decree made in the duchy court was confirmed about 16th July 1660, but the said *German Pole* and some others of the commoners not being satisfied, &c. for further and final satisfaction Sir *William Smith* and Sir *Thomas Hooke* had conveyed one fifth part of the 1350 acres to *German Pole* and others in trust for the commoners, and by them quietly enjoyed ever since, confirmed the said decree and the conveyance of the fifth part to the use of the commoners, and enacted that the rest of the lands as they were set out and held in severalty by the said *Smith* and *Hooke* should be held by them free from all right of common. But there is a saving in the act of the rights of all persons not privy to the agreement. It was admitted between the parties in the present cause, that the right of common of the freeholders and copyholders within the manors of *Duffield* and *Belper* on these two wards was established by a decree in the duchy court in 20 Eliz. and that the copyholders have immemorially enjoyed and still have such right. As to the respective acts of ownership, the plaintiffs proved a series of receipts for a century past of coal pit rents, and cottage rents, and rents for encroachments on these wards, which were applied to the poor rates; and that persons had from time to time been put by them into the vacant cottages on the commons. On the other hand the defendant gave in evidence various presentments and orders at the court leet and court baron respecting nuisances, encroachments, &c. on these wards from 1629 down to 1726. Two or three cottage rents received since 1754; and waifs and estrays taken as far back as 1749.

On a former day in this term this case was argued by, *Clarke* for the plaintiffs, who premised that the effect of the evidence respecting the different acts of ownership ought to have been found as a fact by the jury, and not to have been set forth

in

1788.

REVELL
against
JONRELL.

1788.

REVELL
against
JONRELL.

in the detail: and that the question ought to have been left to them, whether the enjoyment of these wards by the commoners had not been uniformly consistent with the grant of them in free soccage to the commoners by *Car. 1.* But that however the weight of the evidence as it appeared was strongly in favor of the plaintiffs. The continual receipt of coal rents, cottage rents, and encroachment rents, from the time of passing the confirming act of *Car. 2.* to the present is the strongest evidence of the ownership of soil which can be given. And it is by no means answered by the evidence given by the defendant; for notwithstanding the number of orders proved by him in the courts, it does not appear that they were obeyed in any one instance, or that any attempt had ever been made to enforce them. Where orders made, and unobeyed, are not attempted to be enforced, it is the strongest proof that the person had no right to make them. And the evidence of the receipt of cottage rents by the lord is so trifling and so modern, when compared with that on the part of the plaintiffs, that it can have no weight. The evidence too of taking estrays is very weak; but even if it had been much stronger, it proves nothing as to the ownership of the soil. The evidence of ownership therefore is all on one side. As to the admission which has crept into the case that the commoners have still a right of common on the wards, it is an admission of law, and ought not to have been stated. For when it appears that a grant of the soil was made to them, the court must say that the right of common was merged, and that those, who before were only commoners, did then become owners of the soil itself. This appears from 4 *Co. 38. a.* It is not necessary to decide in this case upon the general question, whether, on an enclosure of the lord's waste, the allotments of the copyholders would be copyhold or freehold. For enough is shewn upon this case to entitle the plaintiffs to judgement without entering into such a discussion. It appears that, previous to the grant of *Car. 1.* to the ancestors of the defendant, the crown was possessed of the manors of *Duffield* and *Belper*, including the wards in question, upon which the freeholders and copyholders of those manors had acquired a right of common: and it is not unlikely that, being the demesne lands of the crown, those wards were before that time parcel of the manor of *Duffield*. But admitting that they were, they were effectually severed therefrom by the exception in the grant of those manors to the defendant's ancestors.

cestors, and can never be united again, *Co. Litt.* 324. b. 5. a. If the lord make a gift in tail, or lease for life, of the whole manor excepting *Blackacre*, parcel of the demesnes of the manor, and after, he granteth away his manor, *Black-acre* shall not pass, because during the estate tail or lease for life it is severed from the manor. And so in 11 *Rep.* 50. a. it is said that, If a man make a feoffment in fee of a manor, excepting an acre or an house, and the feoffee afterwards purchase the acre or the house, neither shall be parcel of the manor again. So where an advowson has been once severed. In the case of *Lemon v. Blackwell* (a), *Holt, arguendo*, says that, if one grant away any part of the demesne in fee, though but for an instant, it is severed from the manor, and can never be part of it again. And again in *Shep. Touch.* 75. If a manor be granted, excepting an acre thereof, that acre is thereby, in judgment of law, severed from the manor. Now when the wards were thus severed from the manor, whatever might have been their tenure before, they could no longer be demisable by copy of court roll; for which the case of *Lee and Boothby* (b) is in point. There it was held that if a copyhold be at any time severed from the manor, it can never afterwards be demised by copy. Therefore supposing that these wards were, previous to the grant of the manor by *Car. 1.*, of a copyhold tenure [which as being the lord's demesnes they could not be,] yet they became enfranchised by the exception in the grant, and could never be demised as copyhold afterwards. There is another insuperable objection to considering these wards as copyhold after that grant; for that would be to make the king a copyholder to his own grantee of the manor, the king having reserved the wards in his own possession. If they were freehold at that time they must have continued so; for, as laid down in *Co. Cop.* f. 31. the king could not afterwards have granted them by copy. Another reason why these wards could not be copyhold is, that in all copyhold estates the lord has the freehold; but it is clear that the grantees of the manors of *Duffield* and *Belper* never had the freehold of these wards in them. The very title the defendant sets up to the manors shews that he has no title to the wards. Next as to the general question; even supposing these wards were part of the waste belonging to the lords of *Duffield* and *Belper* before the act for inclosing passed, still they are now held by the plaintiffs as freehold and not by copy. It is well known, and

1788.

REVELL
against
JODRELL.

(a) *Skin.* 192.(b) *Cro. Car.* 521.

1788.

REVELL
against
JODRELL.

the court will take notice, that by the practice of parliament no bill for the inclosure of the lord's waste is permitted to pass without his consent, which must now be taken for granted. Acts of parliament of this sort are in the nature of a conveyance of a certain portion of the soil to those who before had merely a right of common, in lieu of their common; and the lord whose soil it was, by consenting to the act, has done the same as if he had by any specific deed granted the soil to the commoners. Then the question will be, what estate was conveyed to the commoners? The act did not say it should be copyhold, or under what tenure it should be held. Therefore it must be taken to be such an estate as the owner, namely the lord, could convey. Now it is clear that the lord's estate in his waste could not be copyhold; for he could not be a copyholder of his own manor; he could not therefore grant it as copyhold; for according to all the authorities, *Co. Litt.* 58. 1 *Leon.* 56. 1 *Black. Com.* 97. and various others, a new copyhold cannot be created at this day. The lord's estate in his waste could only have been freehold, and as such therefore it must have passed to the commoners. Even if the lord had not given his consent to the act, it would have made no difference; for after the act was passed, the conveyance was absolute, and the consequences deduced from it the same. One further argument arises to shew that these allotments cannot be considered as copyhold. Upon the inclosure these allotments must have certain descriptions and bounds; they become distinct and separate estates; and they will be in the hands of the copyholders of the manors subjects of conveyance, independent of any other estate: but it will not appear that any one acre of this soil, by any description whatever, has ever been on the court rolls; therefore if the court should be of opinion that when inclosed they are copyholds, they will then all appear there for the first time; and the court books will be filled with the surrenders of new estates, which previous to that time had never been heard of within the manor. Upon the principle therefore that new copyholds cannot be created at this day, these allotments cannot be adjudged to have become such.

Hill, Serjeant, for the defendant, said, that as to the lord's being bound by the act of parliament of 22 & 23 *Car.* 2. there was no foundation for the argument; for the rights of persons not parties thereto were expressly saved by it; so that the question still remained open. As to that, the state of the question alone is an answer

answer to the claim made by the plaintiffs. The plaintiffs are *copyholders*; they claim nothing but *in right of their copyholds*, and *in exchange* for a *copyhold* interest in the commons; what else then can the thing claimed be but *copyhold*? Every accessory must be of the same nature as the thing to which it is appendant. It will be material to consider, first, how the right stood immediately after the first grant from the king in 1629; and, secondly, how it is affected by the subsequent grants and transactions.

1st, By the grant of the manor the grantee had all the incidental rights belonging to it. Amongst others, the right of common still continued; all the cases tend to prove that. This right continued to pass by surrender and admission in the lord's court. Nothing appears therefore to shew that the common was severed from the manor. If it had been, after so long a period of time the question would have arisen, not between the lord and the descendants of the original copyholders, but between the lord and strangers. It would long since have passed as freehold; but the admission to the principal copyhold has always carried this. This right was recognised in a very short time after the grant; for an information for intrusion was brought against the commoners. Some of these claimed in right of freehold tenements, others in right of their copyholds within the manors of *Duffield* and *Belper*: the first claimed by prescription; the copyholders relied on the custom of the manors. Their rights therefore in respect of their copyholds existing by immemorial custom, it was not in the power of the crown at that time to sever or grant them away. The copyholders therefore retained the same right after the grant which they had before, notwithstanding the exception contained therein. 8 Co. 63. b. is decisive upon this point. So *Moo.* 811. *Brown*, 231. S. C. The right of common was inherent in the copyhold estate; it would have passed as appendant by a grant of the copyhold; it must always have made part of the two years value which the lord may take for a fine on every death or alienation; so that the lord as well as the copyholder has an interest in it. It is incident to the copyhold, and considered as part of it, and of the lord's estate. *Co. Lit.* 121. b. *Salk.* 169. *Bunb.* 138. *Cro. Jac.* 253. 2 *Rol. Abr.* 61. pl. 5. 6. Now no act of the copyholder, however it might estop him, could divest the lord of any of his incidental rights. A copyholder may as such have a right of common in an adjoining manor;

1788.

REVELL
against
JODRELL.

1788.

REVELL
against
JODKELL.

manor; but it can never be contended that by purchasing that manor he would extinguish for ever the right of common incident to his copyhold, because that would injure the lord. The cases cited on the other side therefore do not apply, for the exception in the grant did not touch the right of the copyholders; and so that right was never once severed from the manor. There were two interests in the common; one in the crown as lord paramount; the other was annexed to the two manors of *Duffield* and *Belper*, the copyholders of which had a right of common thereon. This latter right has always continued annexed to these manors.

2dly, The transactions subsequent to the original grant of *Charles I.* could not affect the interest of the lord, for he was no party to any of them. Neither was there any intention to do so. The freehold indeed was conveyed to trustees in trust for the commoners; but that must be understood *according to their former rights*. It is said too to be given *in lieu* and *in recompence of their common*. Now one thing which comes *in lieu* of another is as the thing itself. *Finch* 67. This therefore, coming in lieu of a copyhold interest, must be copyhold; otherwise it will be suffering that interest which the tenants of the manor derive from the lord to be bartered away for their own advantage. The trust of a freehold may be annexed to a copyhold, though a freehold itself cannot. Nor is this without precedent: it has been done in the manors of *Cottingham* and *Middleton*, and several in *Staffordshire*. Any other construction would be unjust; for since the grant to the trustees the whole right of the grantees has been that of *cestuis que truit qua* copyholders. There being evidence of ownership both ways is not at all inconsistent with the claim of the lord, because he contends that both have rights; but any evidence on his part overthrows the exclusive interest claimed by the copyholders. It was natural enough that there should be more evidence on the part of those, who were in the actual enjoyment of the produce, and whose rights were more beneficial to them. As to the act of parliament, the lord's rights are fully reserved by it; and being so, they cannot be taken away by construction; and a copyhold may be created, much more preserved, by the necessary construction of an act of parliament: the intention of the act that it should be so here is fairly to be presumed, otherwise it would have been to no purpose to introduce such a reservation.

Clarke,

Clarke, in reply. As to the exception in the grant not extending to manerial rights, it is inconsistent with the nature of such a reservation. The defendant took the manors subject to that exception, and to all the consequences of it. Copyholders are capable of taking a grant from the lord; and the grant of the king in this case was the same as a grant of the same thing from the lord would have been, if there had been no exception in the grant to him. For, according to *Swayne's case* (a), after severance the wastes are no longer parts of the manor. Now a copyhold must be within the manor. Again, the evidence given by the plaintiffs of particular acts of ownership are most of them totally inconsistent with the claim set up by the lord; such as receiving rents of different sorts, which have been mentioned. Nor does it appear that these wards ever did pass by surrender in the lord's courts. The expression, made use of in the grant to the trustees for the use of the copyholders *in right of their copyhold estates*, meant only *in proportion* to the *quantity* of land which they were in possession of. The grant made to them was of the *soil* itself; and one *soil* cannot be accessory to another *soil*; and the question here is, not how the *right of common* shall be held, but by what tenure the *soil* shall be held. It has also been said, that the lord was no party to any of the subsequent proceedings: that shews clearly that the courts of equity thought he had no right; for if they had thought otherwise, according to the practice of those courts, they would not have proceeded on the question without making him a party.

Cur. adv. vult.

On this day ASHHURST, J. delivered the opinion of the court.

In the first place, it appears from the state of the case that these two wards being reserved out of the grant to *Titchfield* and others, under whom the defendant claims, were severed from the manor, and have never since been a part of it. In the next place, it appears that upon the subsequent litigation in the duchy court, and the decree in consequence, it was settled and decreed that the king was to have one third of these two wards, and the commoners the other two thirds, together with all cottages, &c. in lieu of their rights of common; and that the same should be conveyed to trustees for the use and benefit of the

(a) 8 Co. 63. Co, Cop. 84. Moo. 811.

1788.

REVELL
against
JODRELL.

commoners, and their heirs, under a fee-farm rent of 40s. And the king by his letters patent granted the same accordingly. It is plain therefore that it was the intention of the decree, that the commoners should have an equitable interest in the whole freehold and inheritance of these two wards, in full right; and the legal interest was accordingly granted to their trustees; and it was not meant that they should merely have a right of commonage, for it expressly declares that they shall have a right to all the cottages and buildings. But it is said that the lord was not a party to these proceedings, and therefore was not bound by them. Had that objection been made recently, it might have admitted of some argument: but after such a length of acquiescence as 150 years without taking any legal steps to have the matter set right, an assent on the part of the lords may fairly be presumed. And as to any acts of assertion of right, they are very inconsiderable when compared with those which have been exercised on the part of the plaintiffs. But laying this out of the case, there can be no doubt upon the issue now before us; for the question is, whether by operation of law these allotments made to the copyholders shall be freehold or copyhold. Now in order to decide that question, it is only necessary to consider what is the nature of a copyhold, and what are the incidents inseparable from it. It is held clearly that a copyhold must be time out of mind, and cannot begin at this day. *Co. Lit.* 58. b. And agreeable to this is the case of *Kempe v. Carter*, 1 Leon. 55. In an action of trespass the issue was, if the lord of the manor granted the lands in question by copy of court roll, according to the custom of the manor. It was proved that the lord had of late granted the lands by copy of court roll, where it was never granted by copy of court roll before; and it was holden that the jury were bound to find *dominus non concessit*; for notwithstanding that, *de facto dominus concessit*, yet not *concessit secundum consuetudinem manerii*; the said land was not customary, nor was it demiseable; for the custom had not taken hold of it. Then was the land now in question ever demised, or demiseable; and had the custom of the manor ever taken hold of it? It clearly had not. Then it never can be copyhold, and of course must pass as freehold. But it is argued that this shall become copyhold by operation of law, as the accessory must always follow the nature of its principal. But the misfortune is that there is no instance shewn, in which a copyhold was ever created by operation

tion of law; and for this plain reason, that a copyhold is not a creature of law, but of fact; it must have custom to support it, and cannot be created by any other mode, unless an act of parliament, which might operate as an estoppel to any man to say that it had not existed time out of mind. And the defendant himself, and those who were concerned for him, were so perfectly well aware of this, that in this very act of parliament, as to other parts of the common which were his own wastes, and which were intended to be allotted to the commoners, care has been taken to insert a special provision that they shall be deemed and taken to be copyhold, and they very wisely would not trust to the operation of law. Therefore, on the whole, we are very clearly of opinion that there must be judgment for the plaintiffs.

Postea to the plaintiffs.

ROE, on the Demise of GREGSON, Widow, *against*
HARRISON.

Friday,
April 25th.

EJECTMENT for a messuage, and a warehouse and stable thereto belonging, in *Manchester*, tried at the last *Lancaster* Assizes before *Perryn*, B. when the jury found a verdict for the plaintiff, subject to the opinion of this court on a case stated.

William Gregson by indenture in 1774 demised the premises in question to *Samuel Harrison*, his executors, &c. from the 25th *December* then next ensuing, for twenty-one years, at the yearly rent of 26 l. payable quarterly; in which indenture is contained a proviso in the words following, to wit; "In case the said *Samuel Harrison*, his executors, or administrators, shall at any time during the said term *set, let, or assign over*, the said hereby-demised messuage or dwelling-house, or any part thereof, without the licence and consent of the said *William Gregson*, his executors, administrators, or assigns, for that purpose first had and obtained *in writing*, these presents, and every clause, matter, and thing herein contained, shall be absolutely null and void to all intents and purposes whatsoever; and then and from thenceforth it shall and may be lawful to and for the said *William Gregson*,

If a lease contain a proviso that the lessee and his administrators shall not *set, let, or assign over*, the whole or part of the premises without leave *in writing*, on pain of forfeiting the lease, the administratrix of the lessee cannot under-let without incurring a forfeiture. A *parol* licence to let part of the premises does not discharge the lessee from the restriction of such a proviso.

The lessor's receiving rent after the forfeiture is no waiver, unless the forfeiture were known to him at the time. *See Compt. 803. 12. Ves. Jun. 196. 15. Ves. Jun. 260. 14. Ves. Jun. 175.*

HIS

1788.

REVELL
against
JODRELL.

1788.

ROE
against
HARRISON.

*To Thomas
Pilling as ap-
-pear below.
M.H.*

his executors, administrators, and assigns, to enter into the said hereby-demised premises, or into any part thereof in the name of the whole, and possession thereof to detain and keep, in such manner as he or they could or might have held and enjoyed the same, in case these presents had not been made; and the said *Samuel Harrison*, his executors, administrators, and assigns, from thence to expel, put out, and remove." The lessee entered, and died, and the defendant took out administration to him, and became possessed of the demised premises. By indenture dated the 13th of *November* 1786, the defendant, as administratrix of her husband, demised the premises in question to hold from the 24th day of *December* then next for the term of nine years, at the yearly rent of 34*l.*; and on which assignment is an indorsement in the words following; "Be it remembered " that before the execution of the above-written indenture, it " was mutually agreed between the parties thereto that the said " *Sarah Harrison*, her executors, or administrators, shall pay the " original rent reserved to *William Gregson*, his heirs, or assigns, " within seventeen days next after the same shall become due " quarterly; but in case she shall neglect or refuse so to do, " then it shall and may be lawful for the said *Thomas Pilling*, " his executors, &c. to pay the same unto the said *William Greg-* " *son*, by and out of the rent above reserved, if he will accept " thereof; and that his receipt shall be good and effectual dis- " charges for so much of the rents for which such receipts shall " be given. And it is further agreed that she the said *Sarah* " *Harrison* shall and will save, keep harmless, and indemnify, " the said *Thomas Pilling*, his executors, &c. from all costs, " charges, and expences, which he or they shall or may pay, " sustain, or be put unto, for or by reason of any ejectment to " be brought upon the demise of the said *William Gregson*, for " the recovery of the possession of the said premises, or any part " thereof." *Pilling* entered according to the lease, and is now in possession. *Gregson* died, having on the 20th day of *October* 1787 made his will, whereby he devised the premises to the lessor of the plaintiff, who brought this ejectment to recover the demised premises, as being forfeited by the demise to *Pilling*. The defendant proved that previous to the 10th day of *October* 1786 *William Gregson*, under whom the lessor claims, gave liberty by parol to *Samuel Harrison*, the tenant, to let the stable, part of the premises demised, but refused to give the like liberty

to

to demise any other part of the premises. On 2d January 1787 William Gregson received of Sarah Harrison 6l. 10s. for a quarter's rent, due the 25th day of December, then last past, and gave a receipt in the following words and with the following memorandum under it; "2d January 1787, received of Mrs. Harrison six pounds ten shillings for rent due 25th December last, per me, William Gregson. No new tenants accepted without consent." The stable is at the distance of six yards from the dwelling-house. Formerly Gregson the owner of the house occupied the stables with the house.

1788.

DOE
against
HARRISON.

Wood was to have argued for the plaintiff, but the court desired the defendant's counsel to begin.

Law for the defendant. The claim of the plaintiff is *stricti juris*; she must bring her case within the penalty of the proviso in the most literal interpretation of it, otherwise the court will not assist her. First, the covenant respects a parting with the whole term, it is "in case the lessee shall set, let, or assign, over, &c." Now the word "over" governs all the preceding words; it is nugatory as applied to "assign" alone; for *assigning* necessarily implies a parting with the whole interest. The proviso does not in words prohibit a setting, or letting, for *part* of the term, but a *setting over* generally; which is in effect, either an underlease with a reservation of rent to the lessee, or an assignment; for the whole interest may be parted with both ways. But a prohibition of an assignment does not include a prohibition of underletting for less than the whole term; nay, a setting over of the whole term with a reservation of rent to the lessee himself is an underlease, and not an assignment. *Str.* 405. Then there has been no assignment in this case, because the rent is reserved to the lessee, and not to the lessor: neither is it an underlease of the whole term, for there is one day short of it: the underlease was to commence from the 24th December, whereas the original lease was to take effect from the 25th. And in forfeitures of this kind, the court has always put the most strict construction upon the terms of the covenant. In the case of *Crusoe dem. Blencowe v. Bugby* (a) a covenant not to assign, transfer, set over, or otherwise do or put away the lease, or premises, was held not to extend to an underlease for part of the term: and the court in giving judgment in that case said, "The courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced

(a) 2 Bl. 766. 3 Wils. 234.

1788.

DOE
against
HARRISON.

“for putting an end to them.” Besides, in order to determine this to be a forfeiture, the court must decide that a proviso not to assign on pain of forfeiting the lease binds the executors and administrators of the lessee. But in the case of *Doe dem. Lord Stanhope v. Skeggs* (a) the court were equally divided upon that question. And there are strong reasons why an assignment by an executor or administrator should not be considered as a forfeiture, because in many cases it may be absolutely necessary for the purpose of paying the debts of the testator or intestate. It appears by the case that there is also another ground of objection against the plaintiff’s recovering these premises as forfeited: if any forfeiture can be incurred under this proviso, it must be of the *whole* premises; but it appears that licence was given by the lessor to the lessee to *let the stable, part of the premises demised*. And the circumstance of its being by parol cannot make any difference. Therefore the lessor has put himself in such a situation that he could not claim a forfeiture of the whole. Now a condition is an entire thing; the lessor cannot dispense with it in part, and enforce it for the rest. *Co. Lit. 219. b. Noy 32. 4 Co. 119. b.* So a penalty is an entire thing; and if the lessor has put himself in such a situation that he cannot claim the whole penalty, he cannot claim a part of it. It is said in 1 *Roll. Abr. 471*, that if a man is bound to make an house, and the obligee discharges him of a single post, he is discharged of all. There are several cases in *Roll’s Abridgement* to the same effect. But even supposing that all these points should be determined against the defendant, still if any forfeiture were once incurred, it has been waved. It has been repeatedly held that acceptance of rent by the lessor, or by the lord, in the case of a copyhold, after the cause of forfeiture, is a complete waiver of it (b). It was indeed held in *Doe dem. Cheney v. Batten* (c) that the intention with which rent is accepted by a landlord is a question for the jury. But *Aston, J.* said in that case, “Where
“an ejectment has been brought on the 4 *Geo. 2. c. 28. s. 2.*
“for the forfeiture of a lease, there being half a year’s rent in
“arrear, and no sufficient distress on the premises; there, accep-
“tance of rent afterwards by the landlord has, I believe, been
“held a *waver of the forfeiture of the lease*; which may well be,
“for it is a penalty, and, by accepting the rent, the party waves

(a) *Tr. 21 Geo. 3. B. R.* cited in *Roe v. Galliers*, ante 134. 140.
(c) *Cowp. 243.*

(b) *Godb. 47.*

“the

"the penalty. But this case is very different." Now in the present case the forfeiture has been waved by the terms of the receipt for rent, which affirmed the tenancy of the defendant as subsisting at *Christmas* 1786. The note which is added at the bottom of the receipt makes the case stronger for the defendant; because it amounts to this, that he should look to the defendant for rent, and not to any new tenant without his consent. Even if the tenancy were at an end by the letting which is stated in the case; yet after acceptance of rent by the lessor of the plaintiff, the defendant at least became tenant at will, in which case notice was necessary before an ejectment could be brought: but here no notice was given.

ASHHURST, J.—Notwithstanding several objections have been taken against the plaintiff's recovering in this ejectment, I am of opinion that there is no sufficient answer to the plaintiff's claim. First it is objected that the covenant only extends to an assignment of the whole term: but that is not to be collected from the words of the proviso, which are, "that the tenant shall not set, let, or assign *over*, the said premises, or any part thereof, without licence of the lessor in writing." Now I think that the word "over" is annexed to the word "assign;" the covenant necessarily means that, if the lessee part with the premises even for a part of the term, his lease should be vacated. Then the assignment, which is stated in this case, must be considered to be a breach of the condition. It was then objected that this proviso not to assign does not extend to persons who come into possession by operation of law, but only to prevent an assignment in fact by the party; and the case of *Lord Stanhope v. Skeggs* was cited. But there the term was taken in execution, and it does not apply to this case. Here it is impossible to argue against the express stipulation of the parties; there is no doubt but that it was competent to the parties to bind their representatives; and the covenant is that neither the lessee, nor his executors nor administrators, shall let, &c. Therefore, for the purpose of this assignment, this term never could be considered as legal assets in their hands. If indeed the word "executors" had not been inserted in the proviso, but it had been confined to an assignment by the lessee himself, it might have been doubted whether the restriction would have extended to the present case.

Another objection taken was that the lessor gave licence to the tenant to let *part of the premises*, namely, the stables, and that

1788.

DOE
against
HARRISON.

I doubt the force of the reasoning from the word over: & it is observable that Judge Walker argues not from that word, but from the words set & let, which seem to me more pregnant with inference against underletting.

T. H. On further attention I see, that the reasoning of Judge Ashurst includes the argument from the words set & let, it being that to prevent their being affected by the word over, & so to give the full scope to them.

1-83.

DOE
against
HARRISON.

that licence destroyed the whole condition. But this is not such a licence to alien as falls within the terms of the proviso; the express words are "licence or consent in *writing*;" whereas this was only a licence *by parol*; therefore this was not a legal licence according to the terms of the covenant. This objection then does not hold, for though the law insisted on by the defendant's counsel may be right, yet the facts of this case do not apply to it. It was, lastly, contended that the forfeiture was waved by the acceptance of rent; there is no doubt but that such a forfeiture as the present may be waved by a subsequent acceptance of rent; but that only holds in cases where the party at the time of receiving the rent is cognisant of the fact of the forfeiture; now here it does not appear that the lessor was cognisant of the forfeiture. The giving of the receipt by the landlord for rent subsequent to the time of the forfeiture is indeed an acknowledgment of the tenancy, but that is only where he knows the act of forfeiture at the time. That principle has been frequently recognized in this court, and the words at the bottom of the receipt import no notice of any actual assignment.

BULLER, J.—The first question is, whether the words of the covenant are to be confined to an assignment of the whole term. It has been contended that no forfeiture could be incurred by letting for a shorter period than the whole term. But no authority has been cited to warrant the court in striking out the words, "let and set." The case in 3 *Wilson*, though a pretty strong one, does not come up to this, for there the word "let" is not used; but that is a material word here, and we cannot reject it. As to the second objection; this is not like the case of Lord *Stanhope v. Skeggs*: there the only ground on which the court entertained any doubt was, that the assignment was the act and operation of law, and not the act of the party. We none of us doubted but that if the party himself had broken the proviso by assigning, that would have been a forfeiture: but that was the case of an execution; and some of the court thought that that was not a forfeiture. If a creditor of the lessee in this case had obtained judgment against him and taken this lease in execution, the same question would have arisen as in that case: but this assignment is by the act of the party himself; and the executors and administrators are expressly named in the covenant. With respect to the lessor's consent to let part of the premises, which, it is contended, waves the forfeiture of the whole; this case does not
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come within the authorities which have been cited, because here was no legal consent to let any part of the premises. Besides, the lessor does not recover in this case for the forfeiture in letting the stable, but for a subsequent forfeiture in letting the whole. Then as to the waiver of the forfeiture by receiving the rent; it has been established in many cases that acceptance of rent shall not operate as a waiver of the forfeiture, or as a confirmation of the tenancy, unless the landlord has notice that a forfeiture was incurred at the time. But here it is not found that the lessor had notice of the forfeiture at the time of receiving the rent.

GROSE, J. declared himself of the same opinion on all the points in this case.

Postea to the plaintiff.

DENN on the Demise of TRICKETT *against* GILLOT and Others.

Friday,
April 25th.

EJECTMENT for a fourth part of certain premises in *Ecclesfield, York*, tried before *Perryn, B.*; verdict for the plaintiff, subject to the opinion of the court on the following case. *George Crawshaw*, being seised in fee of the whole of the tenements of which those in question are one fourth part, in consideration of a marriage then intended between him and *Mary Roper*, and of a marriage portion he was to receive with her, and for providing a jointure for her, and in bar of her dower, covenanted and granted to trustees that he and his heirs would stand seised of and in the premises, to the use of himself the said *G. Crawshaw* and his heirs, until the marriage should take effect, remainder to the use of the said *G. Crawshaw* and *Mary* for their natural lives, and the life of the longer liver of them, remainder *to the use of the heirs on the body of the said Mary by the said G. Crawshaw lawfully to be begotten*, and for default of such issue, to the use of the right heirs of the said *G. Crawshaw* for ever. The marriage afterwards took effect, and there was issue of that marriage four daughters, *viz. Martha*, the mother of the lessor of the plaintiff, *Sarah, Ann, and Mary*. *G. Crawshaw* survived his wife, and continued in possession of the premises until the time of his death. *G. Crawshaw* on 17th November 1783, his wife being then dead, levied a fine to the

If an estate be limited by deed to husband and wife and the heirs on the body of the wife by the husband to be begotten, both have an estate tail. But if the remainder be limited to the heirs of the body of the wife by the husband to be begotten, the estate tail vests in the wife solely.

1788.

DENN
against
GILLOT.

use of such person and persons as he should afterwards by deed or will appoint. And on the 18th November 1783 he by will devised all his real estates unto his daughters *Ann*, the wife of *Richard Gillot*, one of the defendants, and *Mary* then the wife of *Thomas Hobson*, but since deceased, and their heirs, as tenants in common. In August 1785 *G. Crawshaw* died without altering his will; and his daughter *Mary*, the wife of the defendant *Thomas Hobson*, died 31st May 1786, leaving issue by the said *Thomas Hobson* now living. *John Trickett* the lessor of the plaintiff is the only son and heir of the body of *Martha*, one of the four daughters of *G. Crawshaw*, by *James Trickett* her husband, which daughter *Martha* died in the life-time of the said *G. Crawshaw*; and *Sarah* the remaining daughter of the said *G. Crawshaw* is also dead, having previously married one *John Hilton* by whom she has left issue now living. The lessor of the plaintiff on the 26th October 1787 made an actual entry to avoid the fine before the demise laid in the ejectment.

Wood for the plaintiff, after observing that the single question was whether the limitation "to the use of the heirs on the body of *Mary* by *G. Crawshaw* lawfully to be begotten" raised an estate tail solely in the wife, or a joint estate tail in the husband and wife, contended that it was an estate tail solely vested in the wife, and consequently was not barred by the fine levied by the husband. In *Lit. f.* 28. It is said "If the gift be to husband and wife, and to the heirs of the body of the wife by the husband begotten, the wife hath an estate in special tail, and the husband but for term of life. But if lands be given to husband and wife and to the heirs which the husband shall beget on the body of the wife, both have an estate tail; because the word "heirs" is not limited to the one more than to the other." Now the limitation in question is precisely similar to the first part of this section, except that in the case put the words "of the body" are used, whereas they are "on the body". But that cannot vary the question; in sense they are the same, and must have the same legal construction. And the reason which is given in the later part of the section in *Littleton*, to shew that there was a joint estate tail in both, namely, because the word "heirs" is not limited to one more than to the other, proves that under the present limitation the wife alone had an estate tail, because here the word "heirs" is limited more to the wife than to the husband. This covenant to stand seised ought

to receive such an interpretation as is most consonant to the intention of the parties, especially as it was made in consideration of a marriage portion which the wife brought with her. Now the intention clearly was to purchase the inheritance for the issue of the marriage in consideration of the wife's fortune. That intention will be frustrated, and the issue defeated, if this should be construed a joint estate tail in the husband and wife, because the husband in the event that has happened might bar the issue by levying a fine, as the issue must claim under him: whereas if it be an estate tail in the wife alone, the issue could not be defeated without the concurrence of both; and in case the husband died without joining with the wife in levying a fine, the wife alone could not afterwards bar the issue. 11 H. 7. c. 20. And the intention of the parties, that the husband alone should not have it in his power to bar the issue in any event by levying a fine, further appears from the circumstance of there being a limitation over of the reversion in fee in default of issue.

Lambe, for the defendants. The question is not what the parties intended in this case, but what they have actually said in this deed; of which there cannot be any doubt. This limitation falls within the latter part of the twenty-eighth section in *Littleton*, where it is said that "if lands be given to the husband and wife, and to the heirs which the husband shall beget on the body of the wife, both have an estate tail." Those words are in substance and legal effect the same as the present, "to the heirs on the body of the wife by the husband to be begotten." And Lord *Coke* in his commentary on this section (a) says "this word 'heirs' is *nomen operativum*. To which of the donees it is limited, it createth the estate tail; but if it encline no more to the one than to the other, then both take. And there-with accordeth the case in 3 E. 3. 32. where it appeareth quod R. S. dedit. J. R. & M. uxori ejus, & hæredibus quos idem I. de corpore ipsius M. procrearet, &c.; and this was adjudged to be an estate tail in them both, because the estate is equally tailed to the heirs of the baron as to the heirs of the wife." Now that reason peculiarly applies to the present case, because here the estate is not limited more to the heirs of the wife than to those of the husband. In *Repps v. Bonham* (b), where the limitation was to the husband and wife for their lives, remainder to the first and other sons of the body of the wife, remainder to the

1788.

DENN
against
GILLOD.

(a) *Co. Lit.* 26.(b) *Yelv.* 131.

1788.

DENN
against
GILLOT.

heirs of the body of the wife by the husband to be begotten, it was held an estate tail in the wife: but the court there said "If "it had been" to the heirs which the husband shall beget on the body of the wife," it would have created an estate tail in both; for which was cited 19 H. 6. 75. a. giving the same reason as *Littleton* does, because the word "heirs is indifferently limited to both. This very question was decided in *Goffage v. Tayler* (a), where the father on the marriage of his son levied a fine "to the use of himself during his own life and the life of *Leventhorp* his son, and after, during the life of *S. Cotele*, the wife of *Leventhorp*, remainder to the use of the heirs to be begotten upon the body of *Susannah* by *Leventhorp* her husband." The only difference between that case and the present is that "on" is here used instead of "upon;" but they both mean the same. There the court said it was not the meaning of the donor to apply the word "heirs" to the body of *Susannah* only, but to the heirs of both. Though perhaps the distinction between the words "of the body" of the wife as in *Littleton*, and "on the body" as in the present case, may at first appear rather subtle and refined, yet inasmuch as it has been settled and acted upon uniformly from the time of *Edward* the Third hitherto, it would be extremely dangerous, and attended with infinite inconvenience, if it were now to be shaken.

Wood in reply. The cases cited do not carry this point farther than the text of *Littleton* itself; because they do not shew that the estate in this case is not limited to the heirs of the wife more than to the heirs of the husband. And perhaps there may be a difference whether the word "beget" precede or follow the words "the body of the wife." If the former, the word "heirs" may incline as much to the one as to the other; but if the latter, as in the present case, it inclines more to the wife, and then it falls within the reasoning in *Littleton*. The circumstance of this estate's having been the husband's before marriage cannot vary this question, because as the wife brought a portion with her, which is stated to be part of the consideration of the covenant, it must be considered as a purchase.

ASHHURST, J.—This question depends on positive determinations rather than on reasoning. If the words of this limitation had been "the heirs of the body of the wife by the husband to be begotten," the cases would be in favour of the plain-

(a) *Sty.* 325.

tiff: but as the word is *on*, and not *of*, all the determinations are the other way; particularly those in 3 *Ed. 3.* and in *Styles*. If we were at liberty to go into the intention of the parties, I should have been enclined to have read the word *of* instead of *on*; because the wife ought to be considered as a purchaser: but we are tied down by express authorities to give judgment for the defendant.

1788.

DENN
against
GILLOT.

BULLER, J.—The limitations of real property are in general technical. No rule is better established than this, that where there is an estate limited to a person for life, with remainder to the heirs of the body of the same person, it is an estate tail; but the limitation of the remainder must be to the heirs of the body of that person alone. Therefore if an estate be limited to *A.* for life, remainder to the heirs of the bodies of *A.* and *B.*, it is not an estate tail. That was settled in *Gosage v. Taylor* (a), which was cited by *Bathurst, J.* in the case of *Frogmorton dem. Robinson v. Wharrey* (b); the doctrine of which case particularly applies to the present: there (c) Sir *R. Frank*, on the marriage of his son, levied a fine and declared the uses to himself during the joint lives of himself and his son *Leventhorp Frank*, and after the decease of either of them, to the use of *Susan Cotele* for her life, and after her decease to the use of the issue male of the said *Susan* and *Leventhorp*, and the heirs of their bodies, and in default of such issue, to the use of the heirs to be begotten on the body of *Susan* by the said *Leventhorp*, remainder to the right heirs of Sir *Richard Frank*. The marriage took effect, and *Susan* died leaving five daughters, but no son. Sir *Richard* died leaving *Leventhorp* his son and heir. A question arose on the estate which *Leventhorp* took; and the court resolved, first, that if he had been joint-tenant with the wife for life, this had been an estate tail in both, as the word *heirs* is not applied to any body particularly; as *Lit. f.* 28. Secondly, that neither the husband nor wife had an estate tail: not the husband, because he had no prior estate for life: not the wife, because though she took an estate for life, yet the *heirs* are not applied to her body. And thirdly, that it was a contingent remainder to the heirs of both their bodies.

GROSE, J.—We are bound by the authorities to say that this was a joint estate tail in the husband and wife.

Postea to the defendant.

(a) *Sty.* 325. (b) *P.* 10 *Geo. 3.* C. B. 2 *Bl. Rep.* 728. 3 *Wils.* 125, 144.
(c) Mr. *J. Buller* read this from a MS. note.

1788.

Friday,
April 25th.DOE on the Demise of BROMFIELD and Wife against
SMITH.

If a tenant hold under an agreement for a lease at a yearly rent whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he comes of age, the son must make his election in a reasonable time after he comes of age. The delay of a year is unreasonable, and the tenant cannot be ejected upon a half year's notice to quit served after such a delay.

EJECTMENT for a house at *Derby*, tried at the last *Derby* Assizes before *Thomson*, Baron; verdict for the plaintiff, subject to the opinion of this court on a case reserved.

The plaintiff, *Mary Bromfield*, being entitled to an estate for life in the premises in question, entered into the following agreement with the defendant; "*March* the 3d 1778, agreed this day with *Mr. Leaper Smith* to let my house in the *Wardwick, Derby*, at the yearly rent of thirty guineas, he paying taxes; the above agreement to continue during my life, supposing it occupied by himself, or a tenant agreeable to me; a clause to be added in the lease to give my son a power to take the house for himself when he comes of age." At that time the plaintiff *Mary Bromfield* was under coverture, but it was admitted that she had the sole management of her estate. By a lease dated 2d *January* 1770, *Mary Bromfield*, then *Mary Fox*, widow, had demised the premises in question to *John Tomlinson* for a term of ninety-nine years, from the 5th of *April* then next, if both the lessor and lessee should so long live; in which lease there was a clause, that if *Samuel Fox*, son of the said *Mary*, when he arrived at twenty-one, should be desirous to live in the premises, then the lease should be void. The lessee died on the 4th of *April* 1776, on whose death his daughter, *Constance Harpur Tomlinson*, continued tenant to the plaintiff *Mary Bromfield*, till the daughter died in the month of *October* 1777; but previous to her death the plaintiff *Mary Bromfield* had given notice to quit at the then next ensuing *Lady-day*. The premises, after the death of the daughter, continued in the possession of her executor, *Charles Upton*, who paid rent for the same to the plaintiff *Mary Bromfield* up to the 5th of *April* 1778: but for the accommodation of the defendant, *Upton* delivered up the possession to him about a fortnight or three weeks before that time, without any communication between *Upton* and the plaintiff *Mary Bromfield*. The defendant continues in possession of the premises as tenant to the plaintiff, *Mary Bromfield*, under the agreement of the 3d *March* 1778. In the month of *March* 1786, *Samuel Fox*, the son of the plaintiff *Mary Bromfield*, attained the age of twenty-one years; and by a

letter dated 2d *March* 1787, addressed to his mother, he requested her to give the defendant notice the next *Lady-day* to quit the house at *Michaelmas* following, wishing to reside there himself; in pursuance of which request, upon the 16th *March* 1787, the plaintiff *Mary Bromfield* gave the defendant notice to quit at *Michaelmas* next, stating that her son, being of age, had signified his desire to take the house. Several receipts from the plaintiff *Mary Bromfield* to the defendant for the rent were produced from the year 1778 to the year 1783, which were all of dates subsequent to the 5th of *April* in each of those years, and were each expressed to be for rent due at *Lady-day* last, except one receipt dated 31st *March* 1783, for one year's rent due at *Lady-day*: but all the subsequent receipts for rent were dated after the 5th of *April* in each year, and were for rent due *Lady-day* last; the last receipt was dated the 7th day of *April* 1787. Mrs. *Bromfield* resided near *London*, and only visited *Derby* occasionally. The demise in the ejectment is laid on the 2d of *October*, to hold from the 29th of *September* preceding. The question is, whether the plaintiff is entitled to recover.

Gally, for the plaintiff, contended that the defendant was in no way entitled to more than six months notice to quit, and that ending with the year or half year, and computed from *New Lady-day*. Then it is necessary to consider what interest the defendant had, and when it commenced. First, he had an estate for the life of Mrs. *Bromfield*, determinable at any time after *Fox* should come of age, by his election to live in the house himself. Whether the agreement be taken by itself, or with reference to the former lease, or according to the probable intention, the evident meaning of the parties appears to have been to give the defendant the tenancy of the house till *Fox* should come of age, and after that to enable him to live in it whenever he should wish. No other reasonable construction can be put upon it. The defendant could never be considered as tenant from year to year; for if *Fox* had died before his election, the defendant on a bill to compel a specific performance might have claimed an absolute estate for the life of Mrs. *Bromfield*; and to say that *Fox* was confined to make his election on coming of age, would be to construe the agreement wholly for the benefit of the defendant, when it was evidently intended for the benefit of *Fox*. He has elected within a year, and any claim by the defendant to reasonable notice is an argument for allowing a reasonable time to

Fox.

1788.

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Doe
against
SMITH.

1788.

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DOE
against
SMITH.

Fox. Secondly, the defendant's interest commenced from *New Lady-day*. The only evidence either way was the receipt of *March 31*. The others were quite uncertain: though indeed this point seemed rather a fact for the jury.

Clarke, for the defendant: the plaintiff cannot recover in this ejectment; for either the defendant was tenant for the life of *Mrs. Bromfield*; or he was tenant from year to year, and therefore was entitled to six months notice ending at the year. As to the last objection, the holding could not be from *New Lady-day*, because it appears that the executor was in possession after that day. All the receipts but one mention *Lady-day last*, which may be applied to either indifferently: that one is dated the 30th of *March*, and is given for rent due at *Lady-day*, which must be taken to mean the *Lady-day* then next, for *New Lady-day* was then passed; and if that had been intended, this receipt would have been given in the same terms as the others, for *Lady-day last*. And the circumstance is to be explained by attending to the situation of *Mrs. Bromfield*, who did not usually reside on the spot, and was then on a visit there. If then he was tenant from *Old Lady-day*, allowing six months notice, the demise is ill laid, being from *New Michaelmas-day*. At any rate, the party is bound by her notice. As to the principal point; the defendant was tenant for the life of *Mrs. Bromfield*. The power given to *Fox* to take the premises was to be exercised immediately on his coming of age, and not at any time afterwards; and he having neglected to make that election within a reasonable time, and the lessor of the plaintiff having received rent after that time, the defendant's interest has become absolute for her life. Suppose a lease for fourteen years, in case the parties should not agree to put an end to it in seven years; if the landlord accept rent for any time after the seven years, he is bound for the residue of the term. If *Fox* were not bound to make his election on his coming of age, the lease would be binding longer upon one than the other party. This would be contrary to the principle on which leases are founded, and which has frequently been recognised by Lord *Mansfield*, that it must be equally binding on landlord and tenant.

Gally, in reply. This lease is not like the case of a running contract, to which it has been compared, where the party must determine the lease at a particular certain period, otherwise it continues the rest of the term; but this is a lease determinable

on an uncertain event, which may happen at any time; and that is by no means an uncommon case. The event in question was under the control of *Fox*, who was no party to the deed, to whom an election was given to take the house or not after he came of age. He could not exercise this option before; and he has now exercised it within a year, which is no unreasonable time. The defendant was a mere tenant at will after *Fox* came of age, and therefore was not entitled to notice like a tenant from year to year. And the lessor of the plaintiff cannot be bound by her notice, if by the terms of her agreement she was not bound to give any. The notice given was rather in favour of the defendant; for he was not strictly entitled to any.

1788.

DOE
against
SMITH.

Per Curiam. The only material question is, whether the plaintiff's son signified his intention of residing in the house in question within a reasonable time after he came of age? We are of opinion that he did not; for it was nearly a year before he made his election. We do not mean to say that he was bound to elect the day after he came of age; but he should have done so in a reasonable time; otherwise one party would be at liberty to avoid the agreement at any time, while the other would be bound by it. If a year be not too much, why not a year and an half? If within a week or a fortnight, that would be reasonable. But without drawing the precise line what shall be reasonable time, it is enough to say that the notice in this case was not given in reasonable time.

Postea to the defendant.

H E D G E S *against* S A N D O N.

Friday,
April 25th.

DE B T on bond for 200*l.* Plea, that the plaintiff won money of the defendant at cards, and that the bond was given to secure it. The replication stated that the bond was made by the defendant to the plaintiff upon good and lawful considerations, and for securing the payment of a debt justly due

If defendant
plead to debt
on bond that
plaintiff won
money of him
at cards, and
that the bond
was given for
securing pay-

ment of it, to which the plaintiff replies, that it was given for securing the payment of money justly due, *and not* for securing the payment of money won, the replication may either conclude to the country, or with an averment.

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1788.

HEDGES
against
SANDON.

and owing from the defendant to the plaintiff, *and not* for securing the payment to the plaintiff of any money by the plaintiff won of the defendant at play, in the manner and form alleged in the plea; *and it concluded to the country*. To this replication there was a special demurrer, for that an issue was tendered by the replication to be tried by the country; whereas the replication ought to have concluded with an averment as to the matter therein contained, in order that the plaintiff might have had an opportunity to have rejoined. And for that the plaintiff in and by the replication hath attempted to put two points in issue, that is to say, that the writing obligatory was made by the defendant to the plaintiff upon good and lawful consideration, and for securing the payment of a debt truly and justly due and owing from the defendant to the plaintiff, and that it was not given for securing the payment to her of any money won at play by the plaintiff of the defendant, whereby the replication is double; and that the replication contains a traverse of part of the matter contained in the plea, with proper matter of inducement thereto, and yet concludes to the country, whereas it ought to have concluded with a verification; and joinder in demurrer.

Gibbs, in support of the demurrer, insisted, on two grounds, that the replication could not be supported; first, on the general ground that where a defence consists of two dependent facts, and one only is selected and denied by the replication, it must conclude with an averment; and secondly, that the "*Et non*" in the replication was equivalent to a traverse, which must conclude with an averment. As to the first point: The first case of late years is *Smith v. Dovers* (a): that was an action on a bill of exchange; plea, an usurious contract between the plaintiff and the defendant, and that the bill of exchange was given on that contract. The replication stated that it was given for a valuable consideration, traversing the usurious agreement, and concluding with a verification. To this there was a demurrer, assigning for special cause that it ought to have concluded to the country. The court were of opinion that the conclusion was right; and *Buller*, J. said, "If a replication take one out of two dependent facts in a plea, it must conclude with an averment; but if it deny the whole, it must conclude to the country. Then he examined the case by that rule, and said, there were two distinct

(a) *Dougl.* 412.

allegations,

allegations, the usurious agreement, and the bill being given in consideration of that usurious agreement. The replication denied only one of those facts, namely, the usurious contract; and therefore he said that, according to the rule, the conclusion was proper. And he said that *Baynham* and *Matthews* (a) had always been considered as law." The next case was *Mulliner v. Wilkes* (b), which was an action on a promissory note; to which the defendant pleaded an usurious agreement, and that the note was given in pursuance of that agreement. The replication, after protesting against the usurious agreement, stated that the note was not given in pursuance of such agreement; and it concluded to the country. To this the defendant demurred, assigning as cause that it should have concluded with an averment. And the court were of opinion that, as the replication selected and denied one of two facts, the conclusion should have been with a verification. *Law*, who argued for the plaintiff in that case, mentioned the instance of *liberum tenementum*, where the conclusion may be either way. But *Buller*, J. said that was an exception to the general rule, and observed that it stood merely on an usage from the time of *Henry* the Seventh. He said that the protestation in the replication admitted one of the two facts, and the other was denied, which brought it within the general rule that the conclusion should be with a verification. And he added, that he could not agree with what *Denison*, J. said in *Baynham* and *Matthews*, "that the conclusion was right either way." Then followed the case of *Bush v. Leake* (c), which was debt on bond. The defendant, after stating that it was given for two sums of money, and for performance of covenants, pleaded payment of both sums, and a general performance. Replication, that he had not paid the two sums, concluding to the country. To which there was a special demurrer, because it should have concluded with an averment. There the two facts were not dependent, but totally distinct. The cases of *Dovers v. Smith*, and *Mulliner v. Wilkes*, were cited in support of the demurrer; and *Buller*, J. said, "I adhere to the rule as laid down in the cases cited, that where several facts are stated in the plea, and one of them is traversed by the replication, it should conclude to the court. Here there is no traverse, nor could there have been one. There is a great difference between a defence consisting of one fact depending upon several others, and

1788.

HEDGES
against
SANDON.

(a) 2 Str. 871

(b) E. 23 G. 3. B. R.

(c) Tr. 23 G. 3. B. R.

of

1788.

HEDGES
against
SANDON.

of two distinct facts: the plaintiff can only deny one of the former in his replication, and he must then conclude with an averment. And he added, there was no new fact for an inducement to a traverse." From which it is to be inferred, that if there had been any matter for inducement, it would have been otherwise. Next came the case of *Slater v. Carne* (a); debt on bond. Pleas, *non est factum*; and secondly, that the plaintiff gave a defeazance, which he delivered to A. as an escrow to be delivered up on performance of certain conditions; that the defendant had performed those conditions, but before he could get the deed the plaintiff took it out of A.'s hands. To the last plea the plaintiff replied *non est factum*, and concluded to the country. The defendant demurred specially, because it should have concluded with an averment. There it was contended that the denying of the execution of the bond was selecting one of several dependent facts, in which case, according to all the determinations, the conclusion should have been with an averment. *Buller, J.* there doubted whether the plaintiff could put the execution of the bond in issue in any other way; and said that the doctrine in *Baynham* and *Matthews* was correct. And he added in this last case that there could be no traverse where there was no new matter for inducement, and then it comes to an affirmative and a negative. Secondly, If there be any doubt on the first point, the "*Et non*" in this replication is equivalent to a traverse, and then the replication must conclude with an averment. In *Bennet v. Filkins* (b) the court seemed to consider "*et non*" as a traverse; for it was thus argued at the bar, and was not denied by the bench. In the case of *Bush v. Leake*, *Buller, J.* thought there had been a traverse, or at least an "*et non*" in *Mulliner v. Wilkes*; which was considering the "*et non*" equal to a traverse. And in *Baynham* and *Matthews* it was expressly said, that where there is a traverse the replication must conclude with an averment.

Baldwin, contra, was stopped by the court.

ASHHURST, J.—I thought that this case had been so well settled by a variety of modern determinations, that it was not even intended to be argued. The general rule is this; where a replication denies the whole substance of the defendant's plea, there the plaintiff may tender issue, and conclude to the country. But where he selects one out of several facts, he may traverse

(a) *Hil. 25 Geo. 3. P. R.*(b) *1 Saund. 20.*

that

that one, and conclude with a verification. Now here the replication does negative the whole substance of the plea; for it says that the bond was given for a fair and just debt, and not for an unjust one.

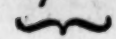
BULLER, J.—The general rule is that which has been stated by my brother *Ashurst*. If the replication put the whole substance of the defendant's plea in issue, he may conclude to the country. At the same time there are exceptions to that rule; and there are many cases in which the conclusion is good either way. It is said that I expressed a doubt in the case of *Mulliner v. Wilkes*, whether what was said by *Denison, J.* in *Baynham v. Matthews*, namely, that the conclusion is proper either way, was correct: but I am now satisfied that what he there said was right. The court of Common Pleas went on this ground in the case of *Sandford v. Rogers (a)*. That was assumpsit for goods sold. Plea, judgment recovered in *K. B.* for the same promises. Replication, *Nul tiel record, et hoc paratus est verificare*. Demurrer, and special cause shewn that by the replication the issue upon the said plea in bar is complete, and the plaintiff ought not to have concluded his replication by a general averment only. After argument, judgment was given for the plaintiff by the court. They thought that the issue was completely joined, and therefore the conclusion might have been otherwise; but inasmuch as the precedents were of conclusions with an averment, they were for supporting it. They said there was no general rule to be laid down as to these things. Practice had in many instances allowed special pleas, which amount to the general issue; so conclusions with an averment where it may be to the country. And they said that in *Gardiner and Fisher, Mich. 1 G. 1.* the defendant pleaded another action pending: the plaintiff replied that the cause of action was different, *absque hoc* that the cause of action in this and the former were the same as alleged in the plea; and *hoc paratus est, &c.*: special demurrer, because the replication should have concluded to the country: but judgment was given to answer over, because the traverse makes the point more certain. *Sir T. Raym. 199.—1 Vent. 101.—2 Keb. 692. S. P.* But they concluded with saying it may be either way. So are all the cases, except that of *Mulliner v. Wilkes*, which was passed over without much

1788.

HEDGES
against
SANDON.

(a) 2 *Wils.* 113. But this was read by Mr. Justice Buller from a *M.S.* note.

1788.



HEDGES
against
SANDON.

notice. Therefore I am of opinion that in such cases the conclusion may be either way.

GROSE, J.—I have always thought that there is good sense in what was said by *Denison*, J. in the case of *Baynham* and *Matthews*. The difficulty on this subject has arisen from dilatory pleas; where the courts have sometimes said that the one conclusion was proper, and at other times that the other was, merely to put an end to the dilatory pleadings. But I agree that in such cases the conclusion either way is proper.

Judgment for the plaintiff.

Saturday,
April 26th.

SILVESTER, on the Demise of LAW, against
WILSON.

A devise to trustees in trust to receive rents and profits during the life of *A.* and that such rents and profits shall be applied for the subsistence and maintenance of the said *A.* during his life, is not an use executed in *A.* and cannot unite with a subsequent legal limitation to the heirs of the body of *A.*

THIS was an ejectment for certain premises in *Halifax* in *Yorkshire*, which was tried before *Perryn*, B. at the last *York Assizes*, when a verdict was found for the plaintiff, subject to the opinion of the court on a case; which stated that *Samuel Wilson*, being seised in fee of the premises, by will dated the 1st of *April 1732*, duly attested, devised (*inter alia*) as follows; “I give and devise unto *John Walton* and *Timothy Walton*, and their heirs, and the survivor of them, and his heirs, all, &c. [the premises, describing them] upon special trust and confidence that they the said *John Walton* and *Timothy Walton*, and their heirs, and the survivor of them, and his heirs, shall stand seised of the said dwelling-houses or cottages for and during the term of the natural life of *John Wilson*, my son, to such use and behoof as is herein-after mentioned, viz. that the said *John Walton* and *Timothy Walton* shall yearly and every year during the natural life of the said *John Wilson*, my son, take and receive the rents, issues, and yearly profits, of the said premises; and my will and mind is, and I do hereby order, that such rents, issues, and yearly profits, shall be applied for the subsistence and maintenance of the said *John Wilson*, during his natural life, as aforesaid; and immediately from and after the decease of the said *John Wilson*, my son, then I do hereby give and devise the said premises unto the heirs of the body of the said *John Wilson*, my son, lawfully to be begotten; and for default of such issue, then I give and devise the same unto the right heirs of me the said *Samuel Wilson* for ever.” The testator

testator died seised, without altering or revoking his will, leaving the said *John Wilson* his eldest son and heir at law, who afterwards in *Michaelmas* term in the 26th *Geo.* 2. duly levied a fine *sur conuzance de droit come ceo, &c.* of the said premises to *Richard Best*, the uses of which were declared to the use of himself for life, remainder in fee to *Richard Best*, under whom the lessor of the plaintiff claims. *John Wilson* died in 1786, leaving the defendant his son and heir at law, who was born in 1755 after the levying of the fine, and who entered upon his father's death.

1788.

SILVESTER
against
WILSON.

Holroyd for the plaintiff. The question is whether *John Wilson*, the son and devisee, took by the will an estate for life only, or in tail. If the latter, it was barred by the fine, and the lessor of the plaintiff's title is regularly deduced from him. This question depends on another, namely, whether the first limitation to *John Wilson* for life be a legal or equitable estate in him, or in other words, whether or not it was a trust executed in him by the statute of uses. The rule in *Shelley's case* (a) has always been adhered to, that where a man by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, "*the heirs*" are words of limitation of the estate, and not words of purchase. In such case the estate for life is united with the subsequent limitation, and forms an estate in fee or in tail in the first taker. *Doe v. Fonnereau*, *Dougl.* 472, and *Jones v. Morgan, Brown, Ch. Cas.* 216. This rule indeed only applies where the first and second limitations are of the same nature, either both legal or both equitable estates. Now here it must be admitted that the second limitation conveys a legal estate: and the question then is, whether the devise to *John Wilson*, the son, be a trust executed in him or not. By a reference to the cases which have been decided, and the principles there laid down on this subject, it will appear that the trust was executed in the present case. First, considering the principles that have been established. Uses and trusts have been held the same as to the operation of the statute. They have been so considered in a variety of cases, and they are so expressed in the statute itself. And the principle appears to have been this, where by the nature of the trust directed it is not necessary or

(a) 1 Co. 104. a.

1788.

SILVESTER
against
WILSON.

requisite that the estate should remain in the trustees in order to carry the purposes of the trust into execution, there the trust is executed by the statute, and the legal estate vests in the *cestuy que trust*. *Broughton v. Langley* (a); in which case it was also held that upon the statute of Uses as well as in other cases the intent of the testator cannot control the operation of law (b). The principal question there was, whether by a devise in trust to permit *A.* to take the profits for his life, and after, the trustees to stand seised to the use of the heirs of the body of *A.*, an estate tail was executed in him? and judgment was given that it was; and it was held that that was a plain trust at common law; and what at common law was a plain trust of a freehold or inheritance is executed by the statute, which mentions the word *trust* as well as *use*. And there the case of *Burchett v. Durdant* (c), *contra*, was denied to be law. The general principle contended for appears likewise from the case of *Jones v. Lord Say & Seal* (d). There the devise was to trustees to satisfy out of the rents and profits several legacies and devises, and to pay several annuities for lives, and afterwards to pay the surplus into the proper hands of the testatrix's daughter, or such person as she should by writing direct, during her life, and then to the use of the heirs of her body, subject to the payment of the several annuities. It is true that in that case it was held a trust, and not a use executed; but the reasons on which the court went are much in favor of this being executed. The trustees in that case were to pay legacies and *annuities* to other persons; they were to reimburse themselves their expences; they were only to pay over the *surplus*, and that to the *separate* use of a *married woman*; those trusts therefore could not possibly have been executed unless the legal estate remained in the trustees. But it seems to have been taken for granted in that case, that if the limitation had been to trustees to pay over to another generally, the use would have been executed. This reasoning is fully established by the Lord Chancellor in *Shapland v. Smith* (e), which went on the idea that the trustees were, after *deducting* rates, taxes, expences and repairs, to pay over the *surplus* only. But even in that case the Lord Chancellor was of opinion that the use was

(a) 2 Salk. 679. Lutw. 816. 1 Eq. Ca.

Abr. 383. pl. 3. 2 Lord Raym. 873. S. C.

(b) 1 Ventr. 372.

(c) 2 Ventr. 311.

(d) 1 Eq. Ca. Abr. 383. and more full in

8 Vin. 262. and 3 Bro. P. C. 458.

(e) Brown's Ch. Ca. 75.

executed

cuted (a). That case shews explicitly that a devise to trustees to pay rents and profits generally is a use executed; and that where the whole profits go to the *cestuy que trust*, the land shall go with it. A devise of the profits has always been considered as a devise of the land itself. And it has been repeatedly held that, wherever a person is entitled to the whole beneficial interest, the possession shall follow it; that the right of possession and the right of exclusive enjoyment shall never be disunited; and that where the trustee is but a mere instrument to receive and pay over to the *cestuy que trust*, the use or trust shall be executed. This court will the more readily adopt these principles in all cases when it is considered that the statute of Uses was remedial; and extends in terms to all uses, confidences, and trusts. Now in the present case, the devise limits the estate to trustees, in trust to receive the rents and profits, with a direction that they shall be applied to the subsistence and maintenance of *John Wilson* for life. It is not said that the trustees shall have the application of them, or that, if they shall, such application is to be at their discretion. But the intention of the testator rather was that the *cestuy que trust* should have the rents and profits for his subsistence and maintenance, and that the trustees should pay them to him, to be by him so applied. For unless the contrary be manifest on the face of the will, it must be construed so as to be most beneficial to the *cestuy que trust*; he is the object of the testator's bounty; no beneficial interest is given to the trustees. If the testator had intended that the trustees should have a complete power over the application of the profits during the life of his son, he would have expressed himself differently. Instead of saying that the profits shall be applied for his subsistence, &c. he would have directed that they should apply them according to their discretion, or words to that effect. If the trustees are to have the application, such injurious consequences will follow as can never be presumed to have been in the intention of the testator. Such a power in trustees would be liable to great abuse, and a great restraint on the *cestuy que trust*. It would subject him to the control, perhaps to the caprice, of others; and place him under a perpetual minority of guardianship. The court will not put him in such a situation unless they are bound by express words, and there are none such here. It must then be considered that

1788.

SILVESTER
against
WILSON.

(a) This was read from a manuscript note, and does not appear in the report of it in *Brown*. *Where the contrary appears.*

1788.

SILVE TER
assnjf
 WILSON.

the application of the profits is to be by him; in which case the devise amounts to no more than this, that the trustees shall *receive* the rents, and *pay* them over to *John Wilson* for his subsistence: and then the whole beneficial interest being in him, and the whole profits going to him, the limitation for life is executed in him, according to the doctrine in *Shapland v. Smith*, the other cases, and the spirit and letter of the statute of uses. And being executed in him, his legal estate for life united with the subsequent limitation to the heirs of his body, and gave him an estate tail, which is barred by the fine; and consequently the lessor of the plaintiff is entitled to recover.

Heywood for the defendant. It was plainly the intention of the testator in this case that his son should take an estate for life only, and that the issue of that son should take the inheritance. However, the question must turn on the legal effect of the technical words which he has used, and not upon his intent. The legal estate was in the trustees during the life of the son; and then the equitable interest which he had cannot be coupled with the subsequent legal limitation to the heirs of his body, so as to execute the trust under the statute, and vest an estate tail in him. That the first devise to the trustees gave the son only an equitable estate for life appears conclusively from *Sheph. Touch.* 482, where it is said that, where lands are conveyed in trust that the feoffees shall take the profits, and deliver them to the feoffor and his heirs, this trust is not within the statute, nor will the statute execute it. In a note to that passage is cited 1 *Eq. Ca. Abr.* 383. where three ways are mentioned of creating a trust; 1st, where a man seised in fee raises a term for years, and limits it in trust for *A.*, &c. for this the statute cannot execute, the termor not being seised. 2dly, where lands are limited to the use of *A.*, in trust to permit *B.* to receive the rents and profits; for the statute can only execute the first use. 3dly, where lands are limited to trustees *to receive and pay over* the rents and profits to certain persons; for here the lands must remain in the trustees to answer these purposes. Now this last rule is immediately in point to the present case, and must govern it. And it has been subsequently recognized by Mr. Justice *Blackstone* (a) who says that where lands are given to one and his heirs in trust *to receive and pay over* the profits to another, this use is not executed by the statute. Now here the trust-

(a) 2 *Black. Com.* 336.

1788.

SILVESTER
against
WILSON.

tees are to receive, and pay over, for certain purposes; and unless the legal estate remains in them, those purposes cannot be answered. This is very distinguishable from the case of *Broughton v. Langley* (a); for there the trustees were to permit the *cestuy que trust* to receive the rents and profits, and there was nothing for them to do: and that distinction was expressly taken in the case of *Jones v. Lord Say and Sele* (b); where too it was held that the different interests could not unite. And the same doctrine was held by Lord *Hardwicke* in *Bagshaw v. Spencer* (c), where one of the questions was, whether the testator's nephew took an estate for life or in tail: and it was determined that he took an equitable estate for life only; though the trustees had not so much discretion as to the distribution of the rents and profits as they have in this case; for after debts, &c. paid, the nephew was entitled to one moiety certain of the estate. As to the case of *Shapland and Smith*; when it is thoroughly considered, it makes in favor of the defendant. That was a question upon a title which depended on the validity of a recovery against which the master had reported. The question was, whether a devise in trust to *receive* the rents and profits, and, after deducting the rates, taxes, and repairs, to *pay over* to C. S. for life, was executed in C. S. to the heirs of whose body the estate was limited over. Baron *Eyre*, and Master *Holford*, were of opinion that it was, but Master *Hett* differed; and the Chancellor afterwards concurred with Master *Hett's* opinion; and the exceptions to the Master's report were ultimately overruled. The trustees having to receive the rents and profits and pay them over has uniformly been determined to take the trust out of the statute. And besides in this case the rents and profits are required expressly to be appropriated by the trustees to the subsistence and support of the son; and they might be called to account, if they applied them to any other purposes.

Holroyd in reply. What is said in *Sheph. Touch.* is overruled by the reasoning in *Shapland v. Smith*; and though the Lord Chancellor was ultimately of opinion in that case that the use was not executed, yet there is a manifest distinction between that case and the present; for there the trustees were to do something besides merely receiving and paying the profits over; they were bound to *repair*, which was the ground of that decision;

(a) *Salk.* 679. (b) 1 *Eq. Cas. Abr.* 383. 8 *Vin. Abr.* 262. (c) 1 *Vez.* 142.

otherwise

1788.

SILVESTER
against
WILSON.

otherwise according to what is said by the Chancellor the use would have been executed. Besides the Chancellor said that if it was even a disputed title he would not oblige a purchaser to take. Now this devise is only a direction that the rents should be applied to the subsistence and maintenance of *cestuy que trust*, and amounts to nothing more than a general application to his use.

The Court said that they would look into the case of *Shapland* and *Smith*; and the next day,

ASHHURST, J.—delivered the opinion of the court.

We postponed giving our opinion yesterday, not as having ourselves conceived any doubt upon the question, but as the case of *Shapland v. Smith* was cited, on the argument of which the chancellor was said to have thrown out an opinion which might govern this case, in deference to so great an authority, we were disposed to look into that case, before we finally gave our opinion. We have now looked into the case, and from the state of it in *Brown's Reports*, we do not find any thing to shake the former authorities upon this subject. In the case alluded to, the master had reported against a title to an estate which was referred to him: on which the question occurred, whether the trustees had the legal estate in them or not; he reported against the title, which report was excepted to. The testator had devised to trustees in trust that they should yearly, after deducting rates, taxes, repairs, and expences, pay the remaining surplus to his brother for life, and after his decease to the use of the heirs of his body. The chancellor said that, the trustees being to pay taxes and repairs, they must have an interest in the premises, and the legal estate for the life of the brother must be in them; and therefore he confirmed the report. This circumstance making the case still stronger than where the trustees are to receive and pay over, it was natural for the chancellor to state it; but he did not deny the authority of the former cases; and as this case did not call for it, it is not likely that he should go out of his way to overturn them. Then taking the former authorities to be unshaken, the case of *Simson v. Turner*, *Eq. Caf. Ab.* 383. and which is recognized in 2 *Bl. Com.* 336. is in point to the present. But there seems to be a circumstance in the present case, which makes it still stronger; for it is not barely to receive and pay, but the testator directs that such rents, issues, and profits, shall be applied for the *subsistence and maintenance* of the said *John Wilson*.

Wilson. The testator therefore seems to mean that the trustees should be invested with some sort of discretion with respect to the application. And if the tenant for life had proved dissolute, and extravagant, and had squandered his money in gaming, to the defrauding of his honest creditors, it is by no means clear that the trustees would not have been justified, either in a court of law or equity, in paying such creditors, before they had paid over the surplus to the tenant for life; as the testator seems to have had some jealousy of his son's conduct, and to have wished that the trustees should have an eye to the application of the money. Therefore we are all of opinion that the judgment must be for the defendant.

Postea to the defendant.

1788.

SILVESTER
against
WILSON.

The KING *against* The Inhabitants of ST OKE.

Saturday,
April 26th.

THE pauper rented a house and land, of the yearly value of 8*l.* 12*s.* 6*d.* in the parish of *Barlaston*, in the county of *Stafford*, in which he then resided; and for ten months of the same time he took the hay-grass and after-math of a meadow in the same parish for 2*l.* 5*s.* 6*d.* He paid no taxes; but he fenced the meadow, and spread the hillocks himself. He was removed from *Stoke* to *Barlaston* by an order of two justices, which the Sessions quashed on appeal. And a rule having been obtained to shew cause why the order of Sessions should not be quashed;

Taking the hay-grass and after-math of a meadow for ten months at the annual value of 10*l.* is a taking of a tenement within 13 & 14 *Car. 2. c. 12.* so as to give the party taking it a settlement.

Leycester now shewed cause, insisting that the agreement for the hay-grass and after-math did not convey to the pauper any interest in the soil; and that that interest which did pass was not a tenement within the statute (a), so as to give the pauper, taking it, a settlement in *Barlaston*. Under the terms of this contract the pauper derived a mere personal right to take the grass and after-math, but no interest in the soil: he was not to take the general, but only particular, profits of the land. Taking the apples of an orchard, or the hops in a piece of hop-ground, would equally pass the soil. The distinction is taken in *Co. Lit. 4. b.* between *pasturam* and *pascuum*; by the former of which the ground itself passeth, but the latter conveys no interest

(a) 13 & 14 *Car. 2. c. 12.*

1788.

The KING
against
The Inhabi-
tants of
STOKE.

in the soil. And this case is of the latter sort. An ejectment could not have been maintained for the grafs. The circumstance which is stated at the end of the case, that the pauper fenced the meadow himself, cannot vary the contract between the parties; it was a mere voluntary act of his own, and for his own benefit. Then if the soil itself did not pass, the interest which was granted cannot be considered as a tenement within this act of parliament. The word "tenement" in this statute is not used in so large a sense as it is in common conveyances; if it were, an office, or a rent, would give a settlement: but that has never been contended. In the case of *R. v. Minchin Hampton* (a), the court said that taking the pasture of a piece of ground would not give a settlement, though renting a piece of pasture ground would. And though that case was determined on another point, namely, for want of an adjudication, yet the reasoning of the court there seems to have been adopted in *R. v. Lock-erly* (b). This case then is precisely similar to that; for this is only a taking of the pasture of a piece of ground. In *R. v. Lindwood* (c), *Parker Ch. B.* said "to answer the description of a tenement within the act of parliament, it should be a renting a house, or ground, of the yearly value of 10 l." In the case of *R. v. Wixley* (d), *Lord Mansfield* gave it as a reason, why a cattle-gate was a tenement within the statute, that they passed by lease and release. A grant of a cattle-gate conveys the soil itself. An ejectment will lie for a beast-gate (e); and a cattle-gate is like it. In *R. v. The Inhabitants of Alresford* (f), where the question was whether a fishery was a tenement, the court said, they must take it that the soil passed; and it was determined on that ground.

Swinerton, contra, was stopped by the court.

ASHHURST, J.—It is clear, from the stating of the case, that the land was intended to pass; it states that "for ten months the pauper took the hay-grafs and after-math of the meadow." Now why should he have taken it for ten months if the soil was not intended to be conveyed? There could be no other profits of this ground but the hay-grafs and after-math; and if a man grant all the profits of the ground, he grants the land itself.

BULLER, J.—This is like the case put in *Co. Lit.* where *pastura* carries the land itself. The pauper was to have the hay and

(a) 2 Str. 874. and cited in *Burr. S. C.* 317. (b) *Burr. S. C.* 318. (c) *Bott.* 348.
(d) *Ante* 1 vol. 138. (e) 2 Str. 1084. *Andr.* 106. (f) *Ante* 1 vol. 358.

after-

after-math, which was all the produce of the soil. This is not like taking hay-grass after severance; for that is only a chattel. But here the contract was, that the pauper should take all the grass which should grow; he was to cut it and make it into hay himself; and after that he was to have every thing which grew on the land for ten months.

GROSE, J.—of the same opinion.

Rule absolute.

1788.

The KING
against
The Inhabi-
tants of
STOKE.

The KING *against* The Inhabitants of NEWTON TONEY.

Saturday,
April 26th.

WILLIAM Salter, Margaret his wife, and their two children, were removed by an order of two justices from *Harbridge, Southampton*, to *Newton Toney, Wilts.* On appeal the Sessions confirmed the order of justices, and stated the following case for the opinion of this court. The pauper, *William Salter*, went into the parish of *Newton Toney* to the house of *William Postans*, a publican there, who had before employed him three times to go into *Shropshire* with some hounds; and, on his return from the last of these journies, he agreed to live with *Postans* as hostler at 4s. 6d. per week, and continued with *Postans* as such hostler for one year and an half, and then went away. Before his departure, on demanding his wages, *Postans* alleged that, as he had received vails, 4s. 6d. a week would be too much, whereupon he agreed to accept after the rate of 10l. a year, in lieu of 4s. 6d. per week. The pauper having received his wages, he left his service and lived elsewhere for five or six months; at the expiration of which time he returned to *Newton Toney*, and agreed with *Postans* to serve him again as his hostler, as he had done before at 4s. per week, which was about 10l. a year; and which he received when he thought proper to ask for it. Under the latter agreement the pauper lived one year and an half, but thought himself as a weekly servant, and at liberty to leave his service at any time during the said two services.

An hiring at
so much per
week is not
an implied
hiring for a
year.

Burrough, in support of the order of Sessions, contended that the first hiring in the parish of *Newton Toney* was a general hiring; and as the pauper served more than a year under it, he thereby gained a settlement in *Newton Toney*. The only difficulty, if there be any in the cases, arises on the reservation of the wages; but that circumstance cannot vary this case, as it only ascertains the

1788.

The KING
against
The Inhabi-
tants of
NEWTON
TONEY.

the *quantum* of the wages, and does not limit the duration of the service, or control the general hiring. Under the first division of cases on this head may be classed those where there was a hiring for a year, for wages not reserved yearly, but for a shorter time, or by the piece; namely, *R. v. Atherton* (a), and *R. v. King's Norton* (b); in the former of which there was an hiring for a year, for wages payable quarterly, where the pauper, by serving a year, was held to gain a settlement; and in the latter of them, a settlement was gained by serving under an hiring for a year to spin at the rate of 1 s. 6 d. per stone. The next division of cases is where there was an hiring by the week, or for less time than a year, at weekly or other wages reserved for less time than a year, where no settlement was gained. And those are *R. v. Wrinton* (c), and *R. v. Brandninch* (d), where there was a weekly hiring, at weekly wages; and *R. v. Elslack* (e), where the pauper was hired to serve as long as the master wanted a servant, at weekly wages. The third class of cases is where there was a general hiring at weekly wages, but where something afterwards passed to shew that the parties did not originally intend to contract for a year; such as *R. v. Dedham* (f). In such a case no settlement can be gained, because the general presumption is rebutted, that it was intended to be a general hiring. There is also another head of cases where a settlement has been gained under a general hiring, at weekly wages, where nothing has afterwards passed between the parties to shew that they did not intend it to be a general hiring, of which description is *R. v. Seaton and Beer* (g). In that case the court held that the pauper should gain a settlement; and that the reservation of weekly wages could not of itself defeat a general hiring. Now the present case is precisely similar to that; here is a general hiring with weekly wages; and it cannot be collected either from the contract itself, or from the subsequent conduct of the parties, that the hiring was intended to be for a shorter period than a year. Neither can the reservation of weekly wages control the general hiring on the authority of *R. v. Seaton and Beer*. With respect to the apprehension of the pauper, it has been repeatedly determined that that cannot vary the case.

(a) *Burr. S. C.* 203. *Bott.* 312.(b) *Burr. S. C.* 152. *Bott.* 282.(c) *Burr. S. C.* 280.(d) *Burr. S. C.* 662. *Eott.* 285.(e) *Hil.* 25 G. 3. *B. R.*(f) *Burr. S. C.* 653. *Bott.* 284.(g) *P.* 24 G. 3. *B. R.*

Marshal,

Marshal, Serj^t, and *Portal*, *contra*, were stopped by the court.

1788.

ASHHURST, J.—The case of *The King v. Dedham* is much stronger than the present. There the pauper hired himself to a plumber and glazier, board, lodging, and washing, summer and winter, at six shillings per week. And though the pauper continued in his service above a year, the court said that they could not make it a hiring for a year, and that the pauper could not gain any settlement by it. It is impossible to distinguish the two cases upon principle. In the present case the pauper hired himself as an hostler at 4s. 6d. per week; but that cannot be considered as a general hiring; and if either party had chosen to dissolve the contract before the expiration of a year, no action could have been maintained by the other. With respect to the apprehension of the pauper, it has been decided in a variety of cases that that cannot vary the contract.

The KING
against
The Inhabi-
tants of
NEWTON
TONEY.

BULLER, J.—This case is not so strong as that of *The King v. Dedham*; for there the expression “summer and winter” shewed that the party had it in contemplation to continue a year in the service. In the present case the hiring is merely at so much per week. Now if there be any thing in the contract to shew that the hiring was intended to be for a year, there a reservation of weekly wages will not control that hiring. But if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring. And the hiring in the present case is of that kind.

GROSE, J.—Considering the situation of the pauper, and what passed at the time of entering into this contract, this appears not to be an hiring for a year. The pauper was hired in the character of hostler, at 4s. 6d. per week; now that circumstance alone shews that he was not likely to continue a year in his service. Besides, it appears that he actually left his service in the middle of the year, which satisfies me that it was not intended by the contracting parties to be an hiring for a year.

Rule absolute.

1788.

Saturday,
April 26th.The KING *against* The Mayor, &c. of CAMBRIDGE.

If a return to a mandamus consist of several independent matters not inconsistent with each other, but part of them good in law, and part bad, the court may quash the return as to such part only as is bad, and put the prosecutor to plead to or traverse the rest.

Where two causes returned are inconsistent, the whole is bad.

That *B.* was not a burges; that he was not eligible to the office of common councilman; and that he was not elected; are not inconsistent returns.

TO a mandamus to the mayor, bailiffs, and burgeses of *Cambridge*, to admit *Patrick Beales* into the office of common councilman, they returned that the borough of *Cambridge* was a borough by prescription, and under a charter of king *James* the First; and that the mayor, bailiffs, and burgeses, have been used and accustomed to admit to the freedom of the said borough such person and persons, upon payment (to the use of the borough aforesaid) of such sum and sums of money as the mayor, bailiffs, and burgeses of the said borough, or the major part thereof, have agreed and fixed upon in common hall; and upon payment of such sum and sums of money, and being sworn into the office of burgeses, such person hath been entitled to all the privileges, rights, and profits, belonging to the office of burgeses of the said borough. And further, that from time immemorial there have been and still are within the said borough certain officers of the said borough, called bailiffs, and other certain officers, called treasurers; and that within the said borough there is, and from time immemorial there hath been, a certain ancient and laudable custom used and approved of, that no burgeses of the said borough hath been eligible to the office of a common councilman of the said borough, who hath not actually served the office of treasurer and bailiff of the said borough, or paid such a sum of money to the use of the said borough, to be excused serving such offices, as has been fixed by the mayor, bailiffs, and burgeses, or the major part thereof, in common hall, upon the application of the burgeses desiring to be excused from serving such offices; which payment of money to be excused serving the said offices has been called passing offices. And further, that on the 11th day of *January* 1785 it was agreed by the mayor, bailiffs, and burgeses of the said borough, then and there assembled in common hall, that *Patrick Beales*, named in the said writ of mandamus, might be admitted to the freedom of the said borough, upon payment of the sum of 30 guineas to the use of the said borough. And the said *Patrick Beales*, being then and there in the common hall of the said borough, claimed to be sworn a burgeses of the said borough, upon payment of the said 30 guineas. And the mayor, bailiffs, and burgeses

gesse, then assembled in common hall, on the said 11th day of *January* 1785, believing that the said *Patrick Beales* had then and there paid the said sum of 30 guineas to the treasurer of the said borough, or to some other person, duly authorised by the mayor, bailiffs, and burgessees of the said borough to receive the same to the use of the said borough, the mayor then and there directed the said *Patrick Beales* to be sworn into the office of burgesse of the said borough; but the said *Patrick Beales* did not on the said 11th of *January* 1785, or any other time, pay the said sum of 30 guineas to the use of the said borough. And further, that afterwards, on the 12th of *April* 1785, it was agreed by the mayor, bailiffs, and burgessees of the said borough, then and there in common hall assembled, that the said *Patrick Beales* should have leave to pass all offices under the bench; that is, should be excused from serving the offices of treasurer and bailiff of the said borough, on payment of the sum of 10 guineas to the use of the said borough; but the said *Patrick Beales* did not on the said 12th of *April* 1785, or at any other time, pay the said sum of 10 guineas to the use of the said borough. And further, that on the 16th of *August* 1787, being a grand common day holden in and for the said borough, a certain bye-law or order was propounded in the following words; that is to say; "Ordered by the mayor, bailiffs, and burgessees, in common hall assembled, that no person shall be eligible to be elected into the office of common councilman, but such as have served the offices of treasurer and bailiff; and that no person, having been dispensed from serving such offices of treasurer and bailiff, shall be eligible to be elected into the office of common councilman, until he has actually served such offices of treasurer and bailiff; any usage, bye-law, or ordinance, to the contrary notwithstanding." Which said bye-law or order, on the 24th of *August* 1787, being a grand common day, was confirmed by the mayor, bailiffs, and burgessees, then and there assembled in common hall; and by reason of the premises the said *Patrick Beales* was and is ineligible into the place and office of one of the common councilmen of the said borough of *Cambridge*. And further, that the said *Patrick Beales* was not duly elected into the said place and office of one of the common councilmen of the said borough, as by the said writ is supposed. And for these causes they the mayor, bailiffs, and burgessees, of the said borough have not admitted, &c.

Wilson

1788.

The KING
against
The Mayor,
&c. of
CAMBRIDGE

1788.

The King
against
The Mayor,
&c. of
CAMBRIDGE

Wilson took several objections to the validity of the return. The general doctrine respecting returns to mandamus is perfectly well known and established. A return requires as much certainty as an indictment; nothing therein is to be taken by intendment or inference. Now throughout this return none of the material facts are positively alleged, but the whole must be understood by intendment only. And even then, if the court can take notice of them at all in the manner they are stated, the return professes to state two causes which are inconsistent, and therefore bad; for first, it is meant to be inferred that *Beales* was not a burghess; and then, secondly, he is admitted to be a burghess, and it is urged that he has not qualified himself to be admitted to the office of common councilman by having served the offices of treasurer and bailiff. But first, as to his not being a burghess. The custom is stated to be to admit such person, &c. to the office of burghess, upon his paying a certain sum; on payment of which sum, he is entitled to *all* the privileges of a burghess; and then it proceeds to state that *Beales* had not paid it; from whence it is meant to be inferred that he was not a burghess. But that is not sufficient: it ought to have been stated as a substantive fact that *Beales* was not a burghess, in such a manner as that the prosecutor might have taken issue on it; and it should not have been left to be collected by inference. Besides, it is stated that on payment of that sum he becomes entitled to *all* the privileges of a burghess; now *non constat* that he is not entitled to *some* of those privileges without payment of that sum, and amongst others to this one: so that consistently with the non-payment of that sum he may be eligible to the office of common councilman. The return then proceeds to state that *Beales* was directed to be sworn in; therefore the court must take the fact to be that he was sworn in accordingly. Then if he were once in possession of his franchise, he became entitled *instantly* to all the privileges annexed to it, and could not be removed from it without being evicted by a *quo warranto* information. If so, the corporation could not suspend him from the privilege of being eligible to the office of common councilman on account of the non-payment of that sum of money; for if that ever were an objection, it must have been an objection *in limine* to his becoming a burghess at all. But if he is sworn in, he is an actual burghess; and if the corporation could not divest him of his office, they cannot abridge him of the full exercise

exercise and enjoyment of it, and amongst others of his eligibility to the office in question. 2dly, The return, admitting him to be a burghess, states a custom that no burghess is eligible to the office of common councilman, who has not either served certain offices, or paid a composition. Now it does not follow from this, nor is it stated as a fact, that any other person than a burghess is ineligible without having served or paid that sum. It is true that the court will take notice of such things as are necessarily incident to all corporations, though they are not particularly stated, as in the case of *The King v. The Mayor of Lyme Regis* (a), where the court held that the power of amotion was in the body at large; but it is not necessarily incident to a corporation that none but a burghess should be eligible to be a common councilman, or even that there should be any such member as a burghess. Then the return, after stating that *Beales* was permitted to pass the offices on payment of 10 guineas, recites a bye-law of a late date, by which, notwithstanding all former customs, it is provided that no person shall be eligible to the office of common councilman, who has not actually served the offices. But this bye-law is bad in point of law, because, first, it narrows the number of persons eligible (b); and, secondly, because it is a fraud on those persons who have paid their money in consideration of being excused from serving the offices. But indeed there is no necessity for arguing this, as there is no allegation that *Beales* has not in fact served the offices. Admitting, however, for argument's sake, the inferences which are intended to be drawn from both these causes returned, then another objection arises to the whole return, namely, that the two causes stated are inconsistent. And though two distinct causes may be joined in the same return, provided they are not inconsistent, yet here they are so; for in the first place *Beales* is denied to be a burghess, and in the next he is admitted to be one. In the case of *The Queen v. The Mayor, &c. of Norwich* (c), it was returned to a mandamus to admit an alderman, that if a person be elected alderman by the ward, the court of aldermen may refuse him; that *Dunch* was elected, but was refused by the aldermen because he had not received the sacrament within a year before his election; that he was a turbulent person; and that he procured his election by

1788.

The KING
against
The Mayor,
&c. of
CAMBRIDGE

(a) *Dougl.* 144.

Northampton, 4 *Burr.* 2260. *Rex v. Spencer*, 3 *Burr.* 1833.

(b) Vide *Rex v. The Mayor, &c. of*(c) 2 *Lord Raym.* 1244. *Salk.* 436. *S.C.*

1788.

The KING
against
The Mayor,
&c. of
CAMBRIDGE

bribery; and the return stated at the end *quod non fuit electus*. It seems to have been admitted on all hands that his not having received the sacrament within a year made his election void, and would have been a good return, if it had been stated by itself; but inasmuch as the return was thought to be repugnant and contradictory, the court granted a peremptory mandamus. And the Chief Justice said, that the court could not believe their return, when they first admit an election therein, and avoid it; and then deny that *Dunch* was elected. And he added, that a return might contain as many causes as the persons who make it please, but then they must be distinct independent matters. Now that was a stronger case than this; for though it expressly appears that the election could not have been good, on account of the omission to take the sacrament, yet because the return was inconsistent, the court would put the corporation to bring their *quo warranto*. The same doctrine was established in the case of *Wright v. Fawcett* (a). Here the causes returned are inconsistent. For first, the return professes to shew that *Beales* was not a burghess; and secondly, that he is a burghess, but that he is not qualified, because he has not served certain offices which no person but a burghess can serve. These are the only two causes which are intended to be expressly returned as such; for as to the allegation at the conclusion of the return, that *Beales* was not duly elected, that is not intended as a substantive allegation, but a conclusion and inference from all the facts stated, which it is the province of the court to draw. By *not duly elected* is meant, *because not eligible*; and it is the same as if the word *therefore* had preceded those words. If the court should be of opinion that the two first causes are bad, and that the last is intended as a distinct allegation, and good, and that a peremptory mandamus should go, it will put the prosecutor under great difficulty, and the court under great embarrassment as to the judgment they may ultimately pronounce: for the statute 9 An. c. 20. §. 2. which expressly permits the defendant in such return to reply, take issue, or demur, only permits the prosecutor to plead to or traverse such return; and as power to demur is specifically given to the defendant, and not to the prosecutor, it should seem as if this latter was prohibited. Therefore, although an insufficient cause should be returned, he will be obliged to go on and plead something issuable; and at last will be driven to

(a) 4 Burr. 2041.

arrest the judgment after all the issues perhaps are found for the defendant. The only way then to prevent such inefficacious proceedings is to award the peremptory mandamus, as was done in the case in *Lord Raymond*, and put the other party to their *quo warranto*.

1788.

The KING
against
The Mayor,
&c. of
CAMBRIDGE

Wood, contra. The latter part of the return, namely, that *Beales* was not duly elected is a good return in itself to the mandamus. There are no words of reference to the antecedent matter, which would undoubtedly do away the effect of it, such as *therefore* or *for the reasons aforesaid*: these would certainly have connected it with what went before, and have reduced it to a mere inference from the facts stated; but it stands now as a distinct substantive return of itself. Returns to a mandamus stand on the same footing as any other proceedings: they are like the pleadings in any civil action. Now these returns are by no means inconsistent; first, it is stated that *Beales* was not a burghers; secondly, that he was not eligible to the office of common council-man; and thirdly, that he was not duly elected. Now, the prosecutor might, if he had pleased, have taken issue on the last, and moved to quash the two first, which is equivalent to a demurrer. And the court may now admit part of the return, and reject the other part.

ASHHURST, J.—The court has a discretionary power of disallowing some parts of a return where it is complicated. Now in the present case we may disallow the two first parts of the return, and send down the third to be tried.

BULLER, J.—What my brother *Ashhurst* has said will obviate the difficulty stated by the prosecutor's counsel. The court may undoubtedly quash the whole return if they choose; then it follows that we may quash a part if we think it right. Then if we quash the two first parts, it will go to trial on the last "whether *Beales* was duly elected:" And if that be negatived by the jury, it will be sufficient to prevent a peremptory mandamus. Where two causes returned to a mandamus are inconsistent, the whole must be quashed, because the court cannot know which to believe, and it is an objection to the whole return. It is like a declaration in which two inconsistent counts are joined; there the plaintiff cannot have judgment. But I do not think that these returns are inconsistent. The first states that *Beales* was not eligible; and, secondly, if eligible, that he was not elected. This is something like the case of *The King v. The Churchwardens*

1788.

The KING
against
The Mayor,
&c. of
CAMBRIDGE

dens of Taunton, St. James (a), where several causes were returned to a mandamus; first, that the person was not duly elected sexton; and secondly that there was a custom to remove, and that he was removed pursuant to such custom. It was there objected that the causes were inconsistent; but the court held otherwise; for they said that he might have been elected in fact, and afterwards removed.

GROSE, J. Of the same opinion.

Per Curiam. Return quashed as to all but the last cause, namely, that *Beales* was not duly elected.

(a) *Corp.* 413.

Friday,
April 25th.

ATKINSON *against* MALING and Others, Assignees of
BURN a Bankrupt.

A delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself.

Where a ship was mortgaged at sea, with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand, the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival, he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees.

TROVER for the ship *Mercury*, tried at the last Sittings at *Guildhall* before *Grose, J.* when a verdict was found for the plaintiff, subject to the opinion of the court on a case in substance as follows. By indenture dated 16th *March* 1785, *Burn* bargained and sold the ship then at sea, and assigned the grand bill of sale thereof, to the plaintiff, for securing the sum of 2000*l.* already advanced by the plaintiff to him, and for securing such further sums as the plaintiff should advance, subject to a proviso or condition therein contained for redemption on payment by *Burn* on demand by the plaintiff of the money then advanced, or which should thereafter be advanced, together with lawful interest. The indenture also contained a covenant, that *Burn* should immediately after the execution thereof cause the ship to be insured, and pay the premium, &c. and it was thereby agreed that until default in payment should be made, it should be lawful for *Burn* to hold the ship and take the profits for his own use and benefit. It also appeared that the grand bill of sale was delivered to the plaintiff on the execution of the said deed. On the 23d *March* 1785, insurance was made by *Burn* on the ship at and from *Shields* to *Jamaica* and back again to *London*. And on the 26th *May* 1785, the following memorandum was made on the back of the policy, and signed by all the underwriters; "That whereas

who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees.

"the

“the within ship having been sold to *Charles Atkinson*, (the plaintiff,) we the insurers on this policy do hereby consent and agree that he shall be entitled to this insurance, the ship having become his property.” On the 12th August 1785 *Burn* became a bankrupt. In September 1785 the ship arrived in *England*, and the plaintiff immediately took possession of her. No actual demand of the money secured by the assignment was proved to be made before the possession of the ship was taken. The defendants who are assignees of *Burn* have converted the ship to their own use.

1788.

ATKINSON
against
MALING.

Chambre for the defendant was desired to make his objections first. He began by stating that it appeared by the express terms of the mortgage that the possession of the ship should continue with the mortgagor till default had been made by him in payment on demand; it being therefore stated that no demand was made, this action is premature, because the bankrupt or his assignees are entitled to the possession of the ship till demand and refusal, without rendering any account to the plaintiff. If it be objected in this case that, *Burn* having become a bankrupt, no demand was necessary, because it was impossible he could pay it; that only holds in cases where a debt is due from the bankrupt: but here the mortgagee had not an absolute right to the ship at all events; the mortgagor had a right to redeem her, and therefore demand was necessary to be made on the bankrupt, or after the assignment on his assignees, in order to give the plaintiff a complete title; for if the assignees had thought it for the interest of the bankrupt's estate to pay the mortgage money, there was an end of the plaintiff's title. But supposing the action right in point of form, yet still the plaintiff is not entitled to recover in point of law; for this is not a valid conveyance as against the creditors at large under the commission, considered either with reference to the statute 13 *Eliz. c. 5.* or 21 *Jac. 1. c. 19.* By the former statute, all conveyances made for the purpose of defrauding creditors are made void. It is not particularly stated what circumstances shall amount to fraud; but a variety of cases have decided that that fraudulent intention is to be collected from the circumstances, of which the not delivering possession to the vendee has always been considered as one. Upon this doctrine *Twyne's case* (a) was determined; it was there held that a conveyance for good and valuable consideration made under such circumstances as these, where the possession was to continue in the grantor, was not a *bonâ fide* conveyance within the act. Now here it does not ap-

(a) 3 Co. 80.

1788.

ATKINSON
against
MALING.

pear when the possession of the mortgagor was to cease: for the conveyance was made for the purpose of securing not only the money which was then advanced, but also all subsequent sums which might be advanced; and it was in the power of the mortgagee under this security to continue the possession and his dealing with the mortgagor down to the time of the bankruptcy; this therefore has a necessary tendency to give a delusive credit, and to defraud creditors who rely on the flourishing appearance of the trader. But if there be any doubt on the statute of *Elizabeth*, the statute 21 *Jac.* 1. c. 19. s. 11. makes the possession of the bankrupt alone a sufficient title to his assignees. The words are that "if any person, at the time he shall become bankrupt, shall by the consent of the true owner have in his possession any goods, &c., whereof he shall be the reputed owner, and take upon him the sale or disposition as owner, the commissioners shall have power to dispose of and sell the same." It has been held under this act that there is no difference between an actual and a conditional sale; it extends to mortgages as well as absolute grants. The cases of *Stephens v. Sole* (a), *Ryall v. Rolle* (b), and *Brown v. Heathcote* (c) establish that position in the fullest manner. And though in this latter case the distinction was taken that the delivery of the bill of lading of goods at sea was tantamount to an actual delivery of goods on shore, because it was the only possession which could be taken of goods in such a situation; yet it has been held in subsequent cases that, when the ship does come into port, actual possession must be taken. But in this case the delivery of the bill of sale could not amount to an implied delivery of the ship itself, because that implication is expressly rebutted by the terms of the contract, the plaintiff not being entitled to the possession till after the mortgagor had refused to pay the mortgage money. And at any rate in order to make the delivery of the grand bill of sale an actual delivery of the thing itself; it must be so intended by the parties themselves. Where the ship was in harbour when the assignment was made, and the mortgagor continued in possession, the property was held to vest in his assignees. *Hall v. Gurney* (d). The present case falls not only within the letter but the spirit of the act, which was to prevent a sale of goods by a trader without an actual delivery, and to produce an equal distribution of the

(a) 1 *Ver.* 352, and cited in 1 *Atk.* 157.

(b) 1 *Atk.* 163.

(c) *Ibid.* 160.

(d) *H.* 24 G. 3. B.R. vid. *Cooke's Bankrupt*

Law 231.

bankrupt's effects among the creditors at large, who have given credit to the apparent circumstances of the bankrupt, which must depend on the property of which he is the ostensible owner. Here the plaintiff enabled the bankrupt to hold out false colours to deceive the rest of his creditors.

1788.

ATKINSON
against
MALING:

Clayton, contra, was stopped by the court.

ASHHURST, J.—The only doubt that can be made arises from the statute 21 *Jac.* 1. But considering the whole of this case, and the nature of the property, that statute will not be found to apply to it. The object of the statute was to guard against fraudulent sales, which are intended to give the trader a fictitious credit, and to enable him to commit a fraud on the generality of his creditors. But considering the nature of this property it is not liable to that objection, nor is it within the mischief intended to be remedied by the act. A mortgage of a ship at sea is very frequently made, is universally recognized, and ought to be encouraged for the benefit of trade. But from the nature of it no actual delivery of the thing itself can be made at the time of the mortgage; and therefore a delivery of the grand bill of sale has always been held sufficient to transfer the property. A mortgage of a vessel at sea is not like a mortgage of other species of property; it is warranted by the common course of trade; and the act of parliament did not intend to prevent such conveyances. Then it is said that a demand ought to have been made; but it appears that the assignees had taken the ship out of the possession of the plaintiff and sold her, therefore by their own act they had made a demand unnecessary; and the money was not paid when the action was brought.

BULLER, J.—As to the objection of form; this is not unlike the case put in *Co. Lit.* (a) where it is said that if a man lend sheep to another to depasture, and he destroy them, the lender may maintain trespass against the other without making any demand of the sheep; because no demand is necessary where the thing is destroyed. Now here the assignees had sold the ship, and so no demand was necessary. The property of the ship by the bill of sale was vested in the plaintiff; and whenever that is destroyed, trover will lie for it without any regard to the proviso or a demand of the money. Then on the general question, whether this conveyance is void under either of the statutes of *James I.* or *Elizabeth*, it has been established by a variety of cases, beginning with that of *Ryall v. Rolle*, that if a ship be sold whilst at sea, the delivery of the grand bill of sale amounts

(a) Sect. 71.

1788.

ATKINSON
against
MALING.

to a delivery of the ship itself. It is the only delivery which the subject matter is capable of. The bill of sale is the only muniment of the property; by the vendee's taking that, he prevents the vendor from defrauding others. Then how can it be said that any false colours were held out to the world in this case? The plaintiff took possession of the ship the first moment she arrived in port. And as to the agreement itself, there is no objection to it. I construe it differently from the defendant's counsel. It is more in favour of the creditor than of the debtor; for the money is payable on demand, which is stronger than if the ship had been agreed to be delivered on failure of payment at six or twelve months; for then no demand could have been made till that time to entitle the plaintiff to maintain his action.

GROSE, J.—There is a great difference between the sale of a ship at sea and of other goods. A person by being in possession of a ship does not thereby acquire any credit; because whoever is requested to advance money thereon will require to be shewn how the other is owner; and if he has no bill of sale to produce, his possession alone amounts to nothing. Therefore it has been invariably held that the delivery of the grand bill of sale is a delivery of the ship itself. Then are there any false colours held out in this case? The plaintiff took possession of the ship the very first moment that he could. Therefore this conveyance is not within either the statute of *Elizabeth*, or of *James* the first. Consequently the plaintiff is entitled to judgment.

Postea to the plaintiff.

Friday,
April 25th.

The KING *against* The Inhabitants of FARRINGTON.

An allowance
of a certificate
of a settle-
ment, as
having been
duly execut-
ed, written
in the mar-
gin of the
certificate,
and signed by
two justices,

TWO justices by an order removed *William Caporne*, his wife and three children, from *St. Mary Lambeth*, to *Farrington*, both in the county of *Surry*: on appeal the Sessions confirmed that order, subject to the opinion of this court on the following case.

In *April* 1736, *William*, the father of the pauper, *William Caporne*, came into the parish of *Farrington*, and procured an instrument

is alone sufficient proof of the certificate where such certificate is above thirty years old; notwithstanding the allowance does not certify the affidavit of one of the witnesses as to the due execution and attestation of the certificate according to the 3 *Geo. 2. c. 29* — *Qu.* Whether an allowance of a certificate written in the margin, and signed by two justices, which allowance does not certify any affidavit made by one of the witnesses, according to the 3 *Geo. 2. c. 29*, can be connected with a writing on the other side of the same paper, not signed by the justices, certifying that such an affidavit was made, so as to amount to proof of such certificate within the provisions of 3 *Geo. 2. c. 29*?

instrument

instrument or paper writing, as a certificate from the parish of *Towcester*, which was delivered to the parish of *Farringdon*, which is as follows;

1788.

The KING
against
The Inhabi-
tants of
FARRING-
DON.

Northamptonshire, } TO the churchwar-
to wit, dens and overseers
of the poor of the parish of *Farringdon* in
the county of *Berks*, or to any or either of
them:

" April 17th 1736.
" Allowed by us, being
" first proved to be duly ex-
" ecuted, as the statute in
" that case directs and ap-
" points.

" A. Heiplurge,
" S. Fleetwood."

Attested by us,
the mark X of
John Johnson,
William Webb.

We James J. Anson, and William Dim-
mock, churchwardens, and William M'Con-
nell, and Joseph Newman, overseers of the
poor of the parish of *Towcester*, in the said
county of *Northampton*, do hereby own and
acknowledge William Caporne, and Sarah

his wife, (now residing in your said parish of *Farringdon*) to be
our inhabitants, legally settled in our said parish of *Towcester*;
and we, the said churchwardens and overseers of the poor, do
hereby oblige ourselves, and our successors for the time being, to
receive and provide for the said William Caporne, and Sarah his
wife, and their family, when they or either of them shall be-
come chargeable to, or forced to ask relief of, your said parish
of *Farringdon*, unless they shall in the mean time have other-
wise gained a legal settlement. In witness, &c. signed by the
churchwardens and overseers.

On the other leaf of the same sheet of paper is also written as
follows; We whose names are hereunto subscribed, two of his
majesty's justices of the peace for the said county of *Northamp-
ton*, do allow of this certificate; and we do also certify that
John Johnson, one of the witnesses who attested the execution
of the said certificate, hath made oath before us that he did see
the churchwardens and overseers, whose names and seals are to
the said certificate subscribed and set, severally sign and seal the
said certificate; and that the mark of the said John Johnson,
and the name of William Webb, whose names are subscribed as
witnesses to the execution of the said certificate, are of their own
proper hand-writing. Dated this 17th day of April 1736.

The pauper's father continued to reside in the parish of *Far-
ringdon* under the said instrument until his death; and his
widow continued to reside in the same parish under the same, till
the pauper (being fourteen years of age) hired himself for a year

1788.

The KING
against
The Inhabi-
tants of
FARRING-
DON.

to Mr. Lewis at Farringdon, which year's service he accordingly performed.

A rule having been granted to shew cause why the order of Sessions should not be quashed,

Mingay and Shepherd now shewed cause. The allowance by the two justices of the original certificate, which is written in the margin on one side of the paper, cannot be connected with the certificate of the execution on the other; there is no reference whatever from one to the other; neither was any evidence given at the Sessions to shew that the certificate of the attestation and execution was written before the allowance by the justices. *Non constat* therefore that it was not written just before the production of the certificate at the Sessions. The certificate by the justices, of the attestation of the due execution, is perfectly distinct from the original certificate. Before the 3 Geo. 2. c. 29. a certificate of a pauper's settlement must have been proved by one of the subscribing witnesses, in order to give effect to it in a court of law. But that statute requires that one of the subscribing witnesses shall make oath before two justices of the due execution of it, which the justices are to certify; and such certificate of the attestation of the due execution of the original certificate is substituted in lieu of all other proof, and is, on production, conclusive evidence of the validity of the latter in any court of law. Here that certificate is wanting; for the marginal note signed by the justices is only an allowance of the original certificate, but not of the attestation of the subscribing witnesses. And even if any other proof of the due execution of the original certificate, than that which is expressly pointed out by the 3 Geo. 2. c. 29. could be given, it is a sufficient answer to the present case, that no such proof was given. Therefore as it stands now, the original certificate must be taken not to have been properly executed and attested (a). This then falls within the principle on which the case of *R. v. Wootton St. Lawrence* (b) was determined. The objection there was, that the certificate was not allowed by the justices; and Lord Mansfield said, "a certificate cannot conclude the parish, unless properly signed. The act requires a conclusive certificate to be under the checks and guards therein particularized. This certificate wants them. Therefore it is no certificate within this act." So in the present case this certificate is of no avail, because it does not appear to

(a) 8 & 9 W. 3. c. 30. *Vide* Str. 402.

(b) Burr. S. C. 581.

have

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

469

have been properly executed and attested as the statute 8 & 9 *W.* 3. c. 30. requires; since no proof whatever was actually given of the execution of it, and the mode of proof required by the 3 *Geo.* 2. c. 29. namely, by a certificate of the attestation of the due execution, was entirely omitted. This is like a codicil, annexed to a will executed according to the statute of frauds, which, if not properly signed, is void, though written on the same paper with the will.

1788.

The King
against
The Inhabitants of
FARRINGTON
DON.

Palmer, in support of the rule, contended, first, that the signature by the justices, in the margin of the original certificate, might be applied to the certificate of the attestation of the due execution on the other; so as to make it a sufficient certificate within the act of 3 *Geo.* 2. c. 29. And secondly, that under the circumstances of this case it was a valid and sufficient certificate, it being allowed by the justices according to the requisites of the 8 & 9 *W.* 3., though the formalities of the 3 *Geo.* 2. were not complied with. First, it has been argued that the attestation of the due execution of the certificate was probably written after the signature of the justices in the margin of the certificate: but the case expressly negatives that, for it is there stated that the certificate was granted to the pauper by the parish of *Towcester*, and delivered by him to the parish officers of *Farringdon*. So that if there were any forgery it must have been by the parish granting the certificate, since it is found by the case that the certificate in question was given by them. The certificate of the attestation therefore must be taken to have been written at the same time with the original certificate; and then the signature of the justices in the margin will apply to both. In many instances the margin is the place where the signature is made; it is so in the calendar of prisoners. In order to give weight to the argument on the other side, it must be contended that the signature must be in a particular place, which cannot be necessary. Supposing the whole to have been written on one side of the sheet of paper, the signature need not have been at the bottom. Then if the certificate had concluded a few lines over the other side of the paper, the signature on one side would have been sufficient, if it bore a reference to the whole contents of the paper. Now this is all on one sheet, and the signature must, from the nature of the subject, be considered as bearing a reference to the whole matter contained in the paper. Secondly, the allowance of the certificate by the justices is sufficient within the 8 and 9 *W.* 3.

1788.

The King
against
The Inhabi-
tants of
FARRING-
DON.

W. 3. And under the circumstances of this case it was sufficiently proved so as to make it a valid certificate, notwithstanding the requisites of 3 *Geo. 2. c. 29.* were not complied with. The words of the allowance are "allowed by us, being first proved to be duly executed as the statute directs." Now this must be sufficient, unless the court will presume either that the allowance is false, or that the justices did not know what were the requisites of the statute. There are no express words in which the allowance of a certificate is required by the act to be made. In *R. v. Ashton Keynes (a)* it was objected that there was only proof by one witness that he was present with the other witnesses, and saw the parish officers sign the certificate, but did not attest the hand-writing of the other witnesses; which was over-ruled by the court; and Lord Mansfield said, "The statute 3 *Geo. 2.* allows a less strict mode of proof; this certificate has been confided in near thirty years; and now the parish objects that the proof was in fact stronger than the law requires." The act 3 *Geo. 2.* requires that one witness should attest not only his own hand-writing, but the hand-writing of the others. This mode of proof before the justices is substituted in lieu of other proof in the courts of law. Now in *R. v. Ashton Keynes* the court must have determined either that the certificate was good under the 3 *Geo. 2.* or that that statute might be laid out of the question, and that it was good within the 8 and 9 *W. 3. c. 29.* It seems that the court went on both grounds; for they considered that the statute 3 *Geo. 2.* was passed to render the proof of the certificate more easy than it was under the 8 and 9 *W. 3.* and that if good under the former act it was sufficient. So that in this case it is immaterial whether or not this certificate be good under the 3 *Geo. 2.* because it is good under the 8 and 9 *W. 3. c. 30.* And the attestation need not have been proved, because it is found by the case that it was delivered above fifty years ago. The statute 3 *Geo. 2. c. 29. s. 8.* "in order to prevent disputes touching the proof of certificates, and for making such certificates more effectual," enacts that one of the attesting witnesses shall make oath, &c. before the justices. So that the evident design of this act, so far from destroying any mode of proving the validity of certificates, was to render the proof more easy. This is like the case of an examination of a soldier before a justice of the peace relative to his settlement,

(a) *Bott. 396. Burr. S. C. 725.*

which is directed by the mutiny act to be received as legal evidence in the courts of law. But that act does not take away the common and ordinary proof of the soldier's settlement. So neither does the 3 Geo. 2. c. 29. repeal the former one 8 and 9 W. 3. c. 30. or prevent the parties from giving any evidence of the certificate which might legally have been received before the passing of that act.

ASHHURST, J.—I am of opinion that the certificate must be allowed. If this question had arisen soon after the certificate was granted, and the parties had relied on the sufficiency of this allowance under the statute 3 G. 2. c. 29. I should have doubted whether the requisites of the act had been complied with. But this act was only passed for the purpose of facilitating the mode of proving certificates, and was not intended to take away any mode of proof which existed before the statute. Now this certificate having been granted above thirty years, it is not necessary to substantiate it by the mode of proof prescribed by this act; for it having been recognised and acted under for so long a period, it was not necessary to have recourse to this act at all. Therefore, on the ground of the length of time which has elapsed since the certificate was granted, I think it is binding; and consequently that the rule must be made absolute.

BULLER, J.—If this certificate be good within the meaning of either of these acts of parliament, the rule for quashing the order of sessions must be made absolute. Now I am of opinion that it is good under both of those statutes. There is no doubt but that this certificate is good under 8 and 9 W. 3. if it be proved; and that act certainly is not repealed by the 3 Geo. 2. c. 29. Now it is an established rule, which holds in the case of all deeds, that if it be above thirty years standing, it proves itself: and here it is stated that this certificate has been granted fifty years. And I also think that it is good within the latter act. The objection, if any, is that the justices have taken upon themselves to say generally that the certificate was executed according to the requisites of the act, without stating *how*: but there is no particular form of allowance prescribed by the act. And if the nature of this instrument be considered, there can be no doubt in this question: if this be compared to a conviction, where the utmost strictness and certainty are required, I agree that it would be bad; but if it be compared to an order of justices, which it resembles more, then it must be held sufficient,

1788.

The KING
against
The Inhabi-
tants of
FARRING-
DON.

1788.

The KING
against
The Inhabi-
tants of
FARRING-
DON.

because every thing is to be intended in support of it. Here the legislature has reposed a trust in the justices of the peace; the act requires certain forms to be pursued, the compliance with which they are to certify. In this case they have allowed the certificate, saying "being first proved to be duly executed, as the statute in that case directs and appoints." Now if the formalities required by the act were not complied with, the certificate must be false; for it could not be proved to have been duly executed but by following the directions of the statute. But we cannot deny credit to the magistrates in the execution of that trust which the legislature has reposed in them. Therefore on both grounds I am of opinion that the certificate is good.

GROSE, J.—If this certificate be good within the statute 8 and 9 *W. 3.* it is good notwithstanding the requisites of the 3 *Geo. 2. c. 29.* were not complied with. Now I think it is sufficiently proved under the statute of *W. 3.* because it is above thirty years standing; and such an instrument proves itself after that length of time. Then it is not necessary to consider whether it be good or not within the act 3 *Geo. 2. c. 29.* The leaning of my mind at present is that it was not sufficiently proved under that statute, because all the requisites of that act have not been complied with. If those formalities have in general been adopted, I should be loth to say that they may be dispensed with. But at present it is not necessary to decide that question, because I am of opinion that it is good under the former statute.

Rule absolute.

The KING against YOUNG and Another.

Monday,
April 27th.

No *certiorari*
lies to remove
an indict-
ment on the
30 *Geo. 2.*
c. 24.

THE defendants had been indicted at the *Bristol* Sessions on the 30 *Geo. 3. c. 24. s. 1.* for obtaining money by false pretences; and

Watson, Serjt. now moved to remove the indictment by *certiorari* into this court, alleging that the defendants could not have an impartial trial at *Bristol*. He was aware that in *R. v. Smith (a)* a *certiorari* to remove an indictment on part of this act had been refused, because the court thought it was taken

(a) *Cowp. 24.*

away

away by the act. But he observed that it did not appear from the report of that case on what section of the statute the defendant was indicted; and probably it might have been on the fourteenth section, in which case the *certiorari* is expressly taken away by the twentieth section. But he contended that that section did not relate to all the preceding clauses in the act; and that of course a *certiorari* lay on the first section, if the defendants laid before the court sufficient reasons to induce them in their discretion to grant it.

The Court however were of opinion that the twentieth section, which enacts "that no *certiorari* shall be granted to remove any indictment, conviction, or other proceedings had thereon in pursuance of this act," referred to the whole act of parliament. That this point appeared to have been already decided in the case in *Cowper*. And that there did not appear to be any reason, from the nature of the subject, why it should relate to one part more than to another.

Rule refused.

CARSLAKE *against* MAPLEDORAM.

Monday,
April 27th.

THE defendant libelled the plaintiff in the archdeacon's court of *Exeter* for speaking the following words of her; "I have kept her common these seven years; she *bath* given me the bad disorder, and three or four other gentlemen besides;" thereby meaning that the said *Mapledoram* was a whore. A prohibition was moved for in the last Term, after sentence, on the ground that the words spoken were actionable.

Gibbs now shewed cause against the prohibition. This application is made after sentence; and therefore, unless it appear on the face of the proceedings that the court below had no jurisdiction over the subject matter, a prohibition ought not to be granted. Now these words are not actionable in themselves, even if the charge related to the present time; and a declaration, without innuendos to explain the meaning of them, would be bad. For there are many disorders which may be termed bad disorders, but the having of which would not render the person an unfit member of society, or be any imputation on him; a *bad*

These words spoken of a woman, "I have kept her common these seven years; she *bath* given me the bad disorder, and three or four other gentlemen," are not actionable, because they may refer to a time past. And no prohibition will be granted to a spiritual court, in which a sentence has been pronounced on a libel for this charge.

Charging a person with *having had* a contagious disorder is not actionable, because it is no reason why the company of a person so charged should be avoided.

1788.

The KING
against
YOUNG.

1788.

CARSLAKE
against
MAPLEDO-
RAM.

disorder does not necessarily mean a *contagious* one. But even supposing that it did, still these words only refer to a time past, and therefore are not actionable. There are two grounds on which words are actionable, as producing a temporal damage; first, charging a person with having committed a crime, for which he may be afterwards punished; and, secondly, charging a person with *having at the time* a contagious disorder. Charging a man with the first of these at a time past is actionable, because he is liable to punishment at any distance of time: but the latter charge does not subject the person making it to an action, unless it be confined to the present time; since the *having had* a contagious disorder is no reason why his society should be avoided in future.

Franklin, in support of the rule. The words are actionable without any innuendo: they sufficiently import a contagious disorder; since the plaintiff below is charged with having communicated it to the defendant himself, and to three or four other persons. In answer to the second ground of objection; it cannot be collected that this charge relates to a time past: it is not that the plaintiff below *had had* this disorder, but the words charge her with *having it at the time*. But even if the charge did relate to a time past, still these words are actionable. In *Austen v. White* (a) these words, "thou wert laid of the French pox," were adjudged actionable. In *Miller's case* (b) *Backster's case* is mentioned, where the words "thou wast laid of the pox" were held actionable. So in *Hob. 219*. "that he *had caught it, and had carried it home* to his wife." In these cases the words clearly refer to a time past. So that it appears upon the libel itself that the court below had no jurisdiction.

ASHHURST, J.—No sufficient ground has been laid before the court to induce us to interpose in this case, and grant a prohibition. This is an application after sentence has been pronounced in the court below. And it seems on the whole that the court below had a jurisdiction over the subject matter. If the plaintiff had called the defendant a whore, such a charge would have given the court below a jurisdiction; and these words, "he hath kept her common these seven years," are tantamount to it. Then notwithstanding the latter words, if the archdeacon's court had a jurisdiction as to part of the charge, these latter words would not make any difference. As to those,

(a) *Crc. Eliz.* 214.(b) *Cro. Jac.* 430.

the distinction has been properly taken. Charging a person with having committed a crime is actionable, because the person charged may still be punished; it affects him in his liberty. But charging another with having had a contagious disorder is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gift of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, his being avoided by society. Therefore, unless some special damage be alleged in consequence of that kind of charge, the words are not actionable. That seems to be the case in all the instances (a) mentioned except one, where the words were "thou wert laid of the pox:" but that seems unintelligible from the report of the case, which is very loosely reported; and therefore it is not much to be relied on. But on principle these words are clearly not actionable, if spoken with a reference to time past. And in this case I think they do relate to past time.

BULLER, J.—After sentence it is incumbent on the party making this application to shew clearly that the spiritual court had no jurisdiction. If therefore it be doubtful, it is an answer to the application. Now in this case it is taking the words against their natural import to suppose that they were spoken of the present time. If they relate to time past, I do not think they are actionable. There is no distinction between a charge of this sort, and a charge of the leprosy, which is to be found in the old books. In those cases it is said that a charge of having *had* such a disorder is no imputation on another, since it does not subject him to any of the inconveniencies attending the having such a disease; so of all other diseases which are contagious. The reason why the making of such a charge is actionable is because the having a contagious disorder renders the person an improper member of society; but there is no reason why the company of a person who has *had* a contagious disorder should be avoided; and therefore such a charge is not actionable. The case in *Cro. Eliz.* which has been cited is too loosely reported to be relied on.

GROSE, J.—of the same opinion.

Rule discharged.

(a) Vide also *Taylor v. Hall*, 2 Str. 1189.

1788.

Friday,
May 2d.SMITH *against* BARROW.

One partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. Where money is owing to two partners, and after the death of one, it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor.

THE plaintiff and *Robert Smith* his father had been in partnership together, during which time one *Keate* became indebted to them in 53*l*. *Robert Smith* died leaving the plaintiff his sole executor. After the death of his father the plaintiff took the defendant into partnership, and *Keate* became indebted to these two in the further sum of 30*l*. He afterwards became much involved, and his effects were transferred to certain trustees for the benefit of his creditors. Two payments were made in the course of distribution at different times. The first, which was made to these parties [the plaintiff and defendant] was divided between them according to their several proportions; that is the proportion of the former debt of 53*l*. to the plaintiff's separate use, and the proportion of the 30*l*. in moities between them. After this the trustees transmitted a bill of exchange to the plaintiff and defendant, in their joint names, and the defendant alone received the money under the title of *Smith and Barrow*. The plaintiff's proportion of this second dividend, so far as related to his original debt, was 79*l*. 14*s*. 6*d*. for which this action for money had and received was brought. A rule was obtained to shew cause why the verdict, which had been given for the plaintiff, should not be set aside, and a nonsuit entered, on two grounds; first, that the action ought to have been brought by the plaintiff as executor or surviving partner. 2dly, That the remittance being made to *Smith and Barrow*, it appears to have been received on a partnership transaction, and one partner cannot maintain this action against another, because a receipt by one is a receipt by both.

Bower, and *Morgan*, who shewed cause against the rule, answered the first objection by observing that the right of action did not accrue against the defendant till after the death of the testator and partner, because the money was not received by him till afterwards. And as to the second ground, that the proportions of the money due to either were very well settled, and indeed had been admitted by the defendant himself upon the former settlement; and the facts clearly shewed that as to the plaintiff's proportion in respect of the former debt due from *Keate*, it could not have been received by the defendant on account

count of the partnership subsisting between him and the plaintiff, and therefore *quoad* such sum they were like any other two indifferent persons, and not as partners; and if so the action might well be maintained.

Bearcroft, and *Russell*, in support of the rule, said that the first objection was taken for the purpose of enabling the defendant to set off any debt which he might have been entitled to, had the action been brought in another form. But supposing that not to be a sufficient ground of objection, they contended that the next was well founded. It lay on the plaintiff to make out the proposition that the money had been received to his use by the defendant. Now the evidence expressly contradicts any such idea. The remittance was made to the partnership; it was an *entire payment* and an *entire transaction*. The money was received by the defendant *as a partner*. He was jointly entitled to receive it with the plaintiff in that character. When received, it made an *Item* in the partnership amount. If any mistake had been made in the bill which was transmitted, and the party transmitting it had paid too much, he must have brought the action against the *partnership* for the surplus, and their joint stock would have been answerable to him. If so then it falls under the common rule, that one partner cannot maintain an action for money had and received against another. And that rule which is founded in reason ought to be extended to this case; for supposing that on the whole of their dealings in partnership the plaintiff should be indebted to the defendant, this latter will be precluded from setting off his debt.

ASHHURST, J.—As to the first objection, that this action should have been brought either as executor, or as surviving partner, the same answer may be given to both. Where money is received after the death of the testator, the executor may declare either in his own right, or as executor, because the testator never had a specific cause of action to recover that sum against the party receiving it, and therefore he may declare in his own name; neither would he shelter himself from the costs as executor, if he were to fail, where he might have brought the action in his own name. The same answer may be given to the objection that this action should have been brought as surviving partner; because this specific sum was never received by him as partner; the partnership was before put an end to by the death of the other partner. Neither is there any foundation for the second objection;

1788.

SMITH
against
BARROW.

1788.

SMITH
against
BARROW.

objection; the two sums belonging respectively to the plaintiff, and to the partnership account, were consolidated merely for the convenience of the party making the remittance. But the sum now claimed by the plaintiff did not belong to the partnership account; and as the defendant has received a sum of money belonging to the plaintiff alone, which he has wrongfully carried to the partnership account, he is liable to refund it in this action.

BULLER, J.—I am of opinion not only that the action is properly brought, but that it could not have been brought in any other form. In what character was the money received by the defendant? the former dividend was received and divided according to the proportions of the respective debts of the plaintiff, and of the plaintiff and defendant as partners. Then on the receipt of the second dividend by the defendant, it should have been divided into two parts bearing the same proportion to each other as the separate demand of the plaintiff on *Keate's* estate, and the joint demand of the plaintiff and defendant. The plaintiff would have been solely entitled to the first part, and must have shared the other part with the defendant as due to the partnership account. So that the first part of this sum was money specifically received by the defendant to the plaintiff's use. And if the action had been brought by the plaintiff as surviving partner, it would have been necessary for him to have shewn that he and the deceased partner had a cause of action against this defendant; but they never had any such cause of action; and it is immaterial to look back to see how third persons were concerned, if as between the plaintiff and the defendant the latter has received a sum of money for the use of the former. Then it has been said that there could be no set off in this case; but I am of a different opinion; for this is an action for money had and received, in which the plaintiff can only recover what is in justice due to him. Therefore supposing any debt were due from the plaintiff to the defendant, it was for the advantage of the latter to bring the action in this form. With regard to the sum of 30*l.* due to this partnership, I agree that this action cannot be maintained. One partner cannot recover a sum of money received by the other unless on a balance struck that sum is found due to him alone. But this objection does not apply to the larger sum in this case, which is the one in dispute.

GROSE, J.—In answer to the first objection, I am of opinion not only that this action may be maintained, but, for the reasons

sons mentioned by my brother *Buller*, that it could not have been brought in any other way; because there never was a joint cause of action in the plaintiff and his late partner. The case of *Hyat v. Hare(a)* is nearly similar to this, where *Holt*, Ch. J. said, "If there be two partners in trade, and one of them buy goods for them both, and the other dieth, the survivor may be charged by *indebitatus assumpsit* generally, without taking notice of the partnership, or that the other is dead, and he survived." In that case the defendant was the surviving partner; but that makes no difference, for the reasoning applies equally to this case. With respect to the other objection; it appears that the defendant has received a sum of money partly on the plaintiff's account, and partly on the partnership account, the former of which he wrongfully carried to the partnership account; but that being his own act, and it being against the truth and justice of the case, I am of opinion that he ought not to be permitted to set up the partnership as a defence to this action. Supposing that the plaintiff had received this money, he would have been entitled to have set apart for his separate use the whole sum, except that part which belonged to the partnership account. Then the circumstance of the defendant's having received it cannot alter the right.

Rule discharged.

(a) *Comb.* 383.FOSTER *against* ALLANSON.Friday,
May 2d.

THIS was an action on an account stated, and other common counts. Plea the general issue. On a rule to shew cause why the verdict which had been obtained by the plaintiff in this cause at the last *York* assizes, before *Perryn*, B., should not be set aside and a non-suit entered; it appeared that in *January* 1785, the plaintiff and defendant had entered into articles of copartnership for seven years, in which there was a covenant to settle yearly at *Christmas*, and to adjust and make a final settlement at the expiration of the partnership, when the stock

Where two enter into articles of partnership for 7 years, in which is a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership,

and they dissolve the partnership before the seven years are expired, and account together, and strike a balance which is in favor of the plaintiff, including several *Items* not connected with the partnership, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise. It is no defence to an action for a debt due, that the plaintiff is a trader, and has committed an act of bankruptcy of which the defendant had notice, no commission having issued nor proceedings had for that purpose: for tho' voluntary payments under such circumstances are not protected, yet payments enforced by coercion of law are valid against the assignees, in case any commission should afterwards be taken out.

1788.

SMITH
against
BARROW.

1788.

FOSTER
against
ALLANSON.

and profits were to be equally divided, and general releases given. In *April* 1785, the plaintiff committed an act of bankruptcy which was known to the defendant, but no commission had ever been taken out on it. In *February* 1786 the parties came to an agreement that the defendant should carry on the business alone; and they then came to a settlement of accounts in which several *Items* were included not relating to the partnership account, and the balance being found in favour of the plaintiff for 140*l.* the defendant promised to pay it.

The motion to set aside the verdict was made on two grounds; first, that the action should have been covenant and not *assumpsit*. Secondly, that the plaintiff having committed an act of bankruptcy which was known to the defendant, the latter was not warranted in paying him the money, as he would be answerable again to the assignees if at any time a commission should be sued out.

On the day for shewing cause the court desired to hear

Cockel, serjeant, and *Holroyd*, in support of the rule. The proper remedy in this case was by action of covenant; for the parties had covenanted to settle accounts and pay the balance, and the rule is that a plaintiff cannot bring an action of *assumpsit* if he has a remedy of a higher nature. The stating of the account does not change the nature of the debt or of the remedy. In *Drue v. Thorn* (a), the action was brought against the husband alone on an account stated, and for goods sold; a special verdict was found, stating that the defendant's wife when sole was indebted to the plaintiff for goods, and that after her marriage with the defendant they accounted with the plaintiff, and a balance was found due to him which the defendant promised to pay. There it was held that the subsequent account did not alter the nature of the debt, and as that was originally due from the defendant's wife, judgment was given against the plaintiff because the wife was not joined. In *Herrenden v. Palmer* (b), administratrix, the declaration was on an account stated between the plaintiff and defendant, on which the latter was found indebted as administratrix, and in her own right. The court held the action did not lie against the defendant notwithstanding the account stated, because the demand included two rights which could not be joined. So in *Bull v. Palmer* (c), where the plaintiff declared in *assumpsit*, setting forth that the defendant had accounted with

(a) *Alley* 72. (b) *Hob.* 88. (c) *Sir T. Jones* 47. 2 *Lev.* 165, S. C.

him, as executor of J. S. and on that account had been found in arrear, and had promised to pay him: *non-assumpsit* being pleaded, the plaintiff was nonsuited; and on motion afterwards it was held that he should not pay the costs, for the action was in right of his executorship, and the money if recovered would have been assets. Again it was held in *Cowp.* 129, that a promise by a defendant to pay debt and costs in consideration that the plaintiff would stay execution under a judgment recovered is not a sufficient consideration on which to raise an *assumpsit*: it was said by Lord Mansfield, to be turning a judgment debt into a debt upon simple contract. All these cases tend to shew that the stating the account in this case did not supersede the original right of action, but that the covenant was still in force. Then the rule (a) applies that *assumpsit* will not lie where there is a remedy of a higher nature. Besides if the plaintiff were to recover in this action, and were to sue upon the covenant afterwards, the judgment recovered in this action could not be pleaded in bar, 1 *Bur.* 9. 2dly, The defendant would be answerable to the assignees for this money, in case any commission of bankrupt should hereafter be taken out upon the act of bankruptcy committed by the plaintiff of which the defendant has notice. It was lately held by the court in the case of *Vernon v. Hankey* (b) that after an act of bankruptcy committed no payment to the bankrupt can be protected if made by a person having notice of the act of bankruptcy. That doctrine was founded upon the principle that the bankrupt is not a free agent, and after the act of bankruptcy has not the legal disposition of any part of his property. Then if the money could not have been paid by the defendant voluntarily, it follows of course that payment cannot be compelled by any action. For otherwise this strange absurdity and injustice will arise, that although a debtor, who has knowledge of an act of bankruptcy committed by his creditor, is willing to act *bonâ fide*, and to discharge his debt honestly, yet he must necessarily be compelled to bear the expence of an action in order to secure himself, which may be greater than the whole amount of the demand. And even suffering judgment to go by default would not protect him; for if it be a good objection to make, he would be bound to take it; otherwise the assignees might recover the debt from him a second time.

(a) *Bull. N. P.* 198.1 *Roll.* 11. l. 2.(b) *Ante* 113.

1788.

FOSTER
against
ALLANSON.

ASHHURST, J.—There is no foundation for this application on either of the grounds mentioned by the defendant's counsel. It is first objected to the form of the action, that an account stated will not lie, because part of that account arose on a partnership transaction, and that as to that the plaintiff has a remedy of a higher nature. But by the stating of the account and introducing other articles not relating to the partnership, the nature of the demand is changed, and a new cause of action arose independent of the articles of covenant. Both parties by agreement consolidated the demand; and the defendant must be taken to have thereby given his consent to consider this as a new debt on an account stated. Besides it is for the defendant's benefit; and it is extraordinary that he should insist on being harassed with two actions, when the whole demand may be recovered in one. There appears to be as little weight too in the second objection. It is objected that the plaintiff cannot maintain this action, because he committed an act of bankruptcy so long ago as in the year 1784, though it was not followed up by a commission, nor by any subsequent steps to obtain one. If this objection were to prevail, it would equally hold at any distance of time, though it were never in the contemplation of any creditor to sue out a commission. But I think that, apart from that consideration, it does not lie in the defendant's mouth to make the objection. Where a person pays voluntarily with notice of the bankruptcy, there the rule holds; but not where he pays by the coercion and judgment of a court of law. An act of bankruptcy cannot over-reach a judgment recovered. If indeed it were by collusion, that might alter the case. But there is no pretence for saying that there is any collusion in the present case.

BULLER, J.—The first question is, whether this action can be maintained in its present form. The parties entered into articles of copartnership, in which there is a covenant to adjust and make a final settlement at the expiration of the term. *Prima facie* therefore the plaintiff was entitled to bring an action on the covenant: if it rested there, the objection must have prevailed. But on the dissolution of the partnership, the parties settled an account. And it is to be observed, that the account was not confined to matters relating to the partnership, but it includes other articles for which covenant will not lie. Therefore when the defendant promised to pay the balance, there was an end of the

the covenant. And even if no other articles had been introduced into the account but those relating to the partnership, I should still be of opinion that *assumpsit* would lie. For the question then would be, whether a previous partnership being dissolved, and an account settled, is or is not in point of law a sufficient consideration for a promise? I have no difficulty in saying that it is (a). Now here there was an express promise by the defendant to pay the balance; and therefore the case cited from *Alley* does not apply; for in that case there was no express promise. It is objected that the judgment in this action could not be pleaded to an action brought on the covenant: but I think it might, if pleaded with proper averments. For a plaintiff cannot recover a double satisfaction: if he has recovered a judgment in one form of action, he cannot afterwards recover in another for the same cause of action. With respect to the other objection, in support of which the case of *Vernon* and *Hankey* is cited; there the payment was made voluntarily with knowledge of an act of bankruptcy, which was followed up by a commission. The assignees can only recover where the payment has been voluntary, and with notice: but in the present case there has been no commission, no docquet was struck; neither was there any intention to sue out a commission; and the defendant will not be considered to have paid this demand voluntarily. If indeed there were any fraud, by the defendant's colluding with the bankrupt in suffering a judgment to be recovered against him, that would be a different case. But there is no fraud in this case; the defendant has no legal defence; and the action is right in point of form.

GROSE, J.—declared himself of the same opinion on both points.

Rule discharged.

(a) *Moravia v. Levy*.—Sittings after Michaelmas, 1786, at Guildhall, cor. Buller J.—Case upon promises. The plaintiff and defendant had entered into articles of partnership, which contained a covenant to account at certain times. This demand arose upon the partnership account, for the amount of the balance struck; which the defendant expressly promised to pay, as was proved.

It was objected by *Erskine* for the defend-

dant, that there being a *covenant* between the parties, this action would not lie. But by

BULLER J.—It does not signify in this case how the debt arose. Here is an express promise to pay the balance which had been struck; and that is the ground of the action; otherwise the objection would have been good.

Verdict for plaintiff.

1788.

Saturday,
May 3d.

A new trial
may be grant-
ed in an in-
formation in
nature of a
quo warranto.

The KING against FRANCIS.

A VERDICT having been found for the defendant in a *quo warranto* information to shew by what authority he claimed the office of alderman of *Cambridge*, a new trial was moved for on the ground that the verdict had been given against the weight of evidence. It was objected, on shewing cause, that no new trial could be granted in an information in the nature of a *quo warranto*; for which *The King v. Bennet* (a) was cited, where a new trial was refused, the judges being equally divided upon the question. But

The Court granted a new trial; saying, that of late years a *quo warranto* information had been considered merely in the nature of a civil proceeding; and that there were several instances since the case in *Strange* in which a new trial had been granted.

(a) 1 Str. 101.

Saturday,
May 3d.

The KING against The Lord of the Manor of HENDON, and RICHARD TROWARD Steward of the Manor.

If the lord of a manor refuse to admit a person to whom a copyhold is surrendered on account of a disagreement respecting the fine to be paid, the court will grant a *mandamus* to compel the lord to admit without examining the right to

the fine; for no right to the fine can arise till admittance.—A covenant made by a copyholder with a stranger to assign and surrender his copyhold to him, which covenant is afterwards presented by the homage does not give the lord any right to a fine.—*A.*, a copyholder covenants to assign and surrender to *P.* which covenant is presented by the homage, but before any surrender *B.* assigns his interest to *C.*, to whom *A.* surrenders. *C.* has a right to be admitted on payment of a fine for his own admittance only.

the

the fines which were due. Lord *Hardwicke* held that assignees of a bankrupt ought to be admitted.[†] If *Goodrich* had acted merely as an agent for *Rankin*, it might have been otherwise; but that was not the fact.

Bearcroft, and *Leycester*, *contra*, were stopped by

The Court, who said, that the reason assigned was not sufficient to warrant them in refusing the application. That they had frequently declared they would give no opinion respecting the lord's fine on an application by a tenant for a mandamus to be admitted, because the lord has no right to the fine at all till admittance. All the lord has a right to require is to have a tenant; and here he had one during the whole time. And they said that any private agreement between *Bonham* and *Goodrich*, not followed up by a surrender of the estate, could not give the lord of the manor a right to any fine, notwithstanding it was presented by the homage.

1788.
The KING
against
The Lord of
the Manor of
HENDON.

What cases are alluded to as precedents of frequent practice. It is not, as far as I know, there is a want of precedents to support the practice of interfering by mandamus for compelling the lord in any case; certainly at least the remedy was supposed to be with all equity. See my note in 4. Stat. copy in ante. 197.

Rule absolute for a mandamus (a).

But according to 3. Ver. Jun. 752. a mandamus does not lie in this sort of case.

(a) Vide *R. v. Rennett*, ante, 197. but there the mandamus was refused, it being the case of an heir, whom the court considered as sufficiently seized without an admittance.

LEMPRIERE and Another, Assignees of JOHN SYEDS, a Bankrupt, against PASLEY.

Saturday,
May 3d.

TROVER was brought by the assignees of the bankrupt to recover the value of about fifty tons of brazilletto wood, of which the defendant had taken possession under an assignment from *Syeds* the bankrupt, before his bankruptcy, and a bill of lading indorsed by him afterwards. The particular circumstances were as follows. *Syeds* having received advice on the 24th of November 1786 from his correspondent, who resided at *New Providence*, by a letter dated the 28th of September 1786, that he was about to ship the goods in question on board the *Elizabeth*, which would sail in seven weeks, on his (*Syeds*) account; and having procured insurance to be made on the 28th of November, applied to the defendant the same day to advance money on the security of these goods, and of the policy of insurance thereon. *Syeds* was at this time already indebted to the defendant in the sum of 190*l.* and upwards, and this latter

An assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading.

Goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expences against the rightful owner.

agreed

1788.

LEMPRIERE
against
PASLEY.

agreed to advance him 200*l.* more on his note of hand, provided the goods in question, with the policy, were assigned over to him as a collateral security for both those sums. This was accordingly done by an instrument, stamped, dated the 29th of *November* 1786, as follows; "These are to certify, that I *John Syeds*, of *London*, ship-broker, having effects in the hands of Messrs. *Tinker and Forbes*, merchants, of *New Providence*, and having received advice from them, by letters dated the 28th and 30th of *September* last, that they had engaged freight to ship on board the *Elizabeth*, &c. bound for this port, who would sail in *November* 1786, about 50 tons of braziletto on my account, I do hereby engage and oblige myself, my heirs, executors, administrators, or assigns, to assign, deliver, and set over, to *John Pasley*, Esq. &c. the whole of the said braziletto, shipped on board the said ship *Elizabeth*, in consideration of 400*l.* being advanced to me by the said *John Pasley*, as a security for the payment of my notes of hand given him for the money received by me from him. And further, I oblige myself to deposit in his hands the policy of insurance made on the said braziletto; and as soon as the bill of lading is transmitted to me, to indorse and deliver the same over to him (the defendant), his heirs, &c. And further, it is to be understood that if the said braziletto by any accident should not produce to the said *John Pasley* the amount of the said 400*l.* advanced to me, I engage myself, my heirs, &c. to make the same deficiency good on demand. And if the said braziletto should produce more than the above sum advanced me, after all charges and interest are paid, the balance of the same remaining is to be placed to my credit." Signed and sealed "*John Syeds*." The policy and the letters of advice were deposited with the defendant at this time; and the bill of lading was indorsed over to him as soon as it arrived, but not till after the act of bankruptcy, which was on the 2d of *February* 1787, and the commission issued on the 10th. On the arrival of the ship in *April*, the goods were delivered by the captain to the defendant, who paid the freight and charges thereof. No tender was made by the plaintiffs of the amount of these charges when the goods were demanded, As to which *Grose*, J. making his report, said that it appeared very clearly that the defendant was resolved to dispute the question as to the right of possession to these goods, and therefore it would have been nugatory to have tendered the freight to him.

The principal question was, what right passed under the assignment to the defendant; and whether he had a right to retain possession as against the assignees, the bill of lading not having been indorsed to him till after the bankruptcy. He was of opinion, under those circumstances, that the legal property of the goods remained in the bankrupt till the indorsement, and that he could not divest himself of it after his bankruptcy, in prejudice to the rest of his creditors; and therefore refused to nonsuit the plaintiffs, who thereupon obtained a verdict. A rule having been granted to shew cause why the verdict should not be set aside, and a new trial granted;

Bearcroft and *Erskine* shewed cause. The question is, whether the property in these goods passed from the bankrupt before the time of his bankruptcy; for if not, nothing that he could do afterwards could transfer that property. Now all that passed before the act of bankruptcy rested in agreement merely. There was nothing which amounted to an actual legal assignment; it was only an agreement to assign when the goods should arrive. The instrument itself does not purport on the face of it to be an absolute transfer of the property. That could only pass by the indorsement and delivery of the bill of lading; and that was done too late, being after the act of bankruptcy. As to the delivery of the policy, that never can be contended to be an assignment of the goods, and therefore may be laid out of the case. As to the freight not having been tendered by the plaintiffs, it was not necessary in point of law to be done. If the defendant had no right to the goods as against the assignees, he cannot raise a new lien upon them by his own wrongful act. In this case his possession is a tort. The freight was not paid by him by the authority of the plaintiffs, or for their benefit; he did it in his own wrong. But a lien is a right, and as such cannot be derived from a wrong. The freight was not tendered by the plaintiffs, because they meant to disaffirm all the defendant's acts. But besides, there is another answer in point of fact; for upon application being made to the defendant for these goods, he absolutely refused to give them up, and insisted upon his right to them, and his determination to dispute the question. This conduct rendered any tender unnecessary.

Piggott, and *S. Heywood*, in support of the rule, argued, first, that on general principles of equity the defendant was entitled to retain possession of the goods in question; and if he would of

1788.

LEMPRIERE
against
PASLEY.

1788.

LEMPRIERE
against
PASLEY.

course obtain relief in a court of equity under these circumstances, this court will not unnecessarily compel him to seek that relief in another mode than the present, and at a great increase of expence. The assignees of the bankrupt must stand exactly in his situation. If he would have been bound by this agreement with the defendant, they who represent him must equally be bound by it. Now here the bankrupt became a trustee for the defendant by the original contract. *Salk. 449. Ex parte Byas, 1 Atk. 124.* And therefore, if no bill of lading had existed in this case, the assignees would equally have been bound. Now it is not disputed but that the defendant had an equitable lien on these goods before the act of bankruptcy was committed, and that the bankrupt himself would have been bound by it; then unless it can be shewn that the transaction was fraudulent, that lien cannot be divested by the act of bankruptcy, because the bankrupt could transfer no more right to the assignees in these goods than he himself possessed; and it appears clearly that he had only a qualified right in them, namely, subject to the defendant's lien. The transaction is perfectly fair. Notice was sent to the bankrupt that these specific goods were about to be shipped on his account; the name of the vessel was mentioned, and the probable time of her sailing; the goods were insured. All the letters and documents were laid before the defendant; and on the faith of these, and the policy's being put into his hands, he entered into the agreement, and advanced his money. No other security could have been taken by him at the time, for the bills of lading were not then arrived. It is material to consider that this question does not arise between the defendant and a creditor under an execution, or a *bona fide* purchaser under the bill of lading; for such persons claim adversely, and the law in that case favours him who gets possession first under a legal title, without notice of the previous lien. But the plaintiffs are privies to the bankrupt's estate, and therefore stand in a different situation, and are liable to the same equities which the bankrupt himself would have been. The case of *Brown v. Heatbcote* (a) is decisive of this question. There *Williams* and his partner gave a bond to the defendant for 1200*l.* and by way of collateral security assigned to him on the same day two ships then at sea, and also delivered to him thirteen bills of lading and policies of insurance of the cargoes, the latter of which were indorsed to

(a) 1 Atk. 160.

him;

him, but the former were not. *Williams* became a bankrupt, and a bill was brought by the plaintiff as his assignee for the goods, insisting, as in this case, on the circumstance of the defendant's not having been put in possession of them at the time. But Lord *Hardwicke* was clearly of opinion that he was entitled to retain possession of every thing till his debt was satisfied. His lordship in that case expressly recognised the principle contended for, that assignees must take subject to all equitable liens against the bankrupt himself. The very objection was taken in that case that the deed was not an absolute assignment; Lord *Hardwicke* admits that it was not, but says that there was sufficient on the face of it to shew that the defendant had a charge and lien on the goods. He also gave it as his opinion that assignments of goods and property at sea could not have been intended to be controlled by the 21 *Jac. c. 19.* because it is impossible to make an actual delivery of goods so circumstanced. And lastly, he relied upon the circumstance that every thing in the possession of the bankrupt which could shew a right to the goods had been delivered up to the defendant. The circumstances here are as nearly similar as can be; for though it is stated in that case that the bills of lading were delivered to the mortgagee, yet they were not indorsed, and therefore the strict legal property did no more pass in that case than in the present. But an equitable lien attached upon the goods; and as it was lawful for the bankrupt to enter into such a contract at the time, and he did every thing which was possible in the nature of the case to part with his right to the goods, and subject them to this onus, his assignees cannot take them discharged of it. If the defendant had rested his title merely on the indorsement and delivery of the bill of lading, there might have been some weight in the objection made on the other side; but the indorsement must be taken to have relation back to the former agreement. If it be contended that the title of the assignees relates back to the time of the act of bankruptcy, still that only goes to set aside mesne assignments between the act of bankruptcy and the commission (a), and cannot divest the equitable title of a *bonâ fide* creditor who claims prior to the act of bankruptcy; for the doctrine of relation is a fiction of law, and cannot work a wrong. But if the relation to the act of bankruptcy is to take place, the other relation will also hold; and the indorsement and delivery of the bill of

1788.

LEMPRIERE
against
PASLEY.

(a) *Kiggil v. Player, Salk. 111.*

1788.

LEMPRIERE
against
PASLEY.

lading will vest the legal property in the defendant as from the agreement. So in the case of attornment, 1 *Inst.* 310. which has relation to the time of the feoffment. Or a fine, which has relation back to the covenant to lead the uses. 1 *Show.* 298. Or institution to presentation. Sir *W. Jones* 428. This case cannot be distinguished from that of *Brown v. Heathcote* upon principle.

Cur. adv. vult.

ASHHURST, J.—Now delivered the opinion of the court. After stating the facts—Two questions have been made; first, whether the plaintiff could at any rate recover in this action without first tendering the freight and charges. Secondly, which is the principal question, whether the defendant on the circumstances of the case has not such a property as entitles him to hold against the plaintiffs. As to the first question, the court have already intimated an opinion, namely, that if the defendant is to be considered as a mere wrong doer, the plaintiffs would have no occasion to tender him an indemnification for expences incurred by him in order to obtain a wrongful possession. But the second question is a material one. In order to the discussing of which, I shall lay down the following principles which appear to me to be clear. As between a person who has an *equitable lien* and a third person, who purchases the thing for a valuable consideration, and without notice, the prior equitable lien shall not overreach the title of the vendee. For the title of him who has both a fair possession and an equitable title shall be preferred to that of a mere equitable interest. But as between the person who has the equitable lien and the assignees, if the lien subsisted before the bankruptcy, they shall never recover or retain the thing without discharging the money due. The party who has the equitable lien ought not to be on a footing with the rest of the creditors, for whom the assignees are trustees; for the creditors at large trusted to a personal credit; but he who has the lien never gave a personal credit, but trusted to the thing. The money lent to the bankrupt would never have become a part of the assets of the bankrupt, had it not been lent upon the credit of the thing pledged; and when the money is taken out of the bankrupt's effects and repaid, they are only just where they would have been if the money had never been advanced. As between the person having the lien and the assignees, they must stand in the place of the bankrupt, and take his property subject to all the equitable

equitable liens to which it would have been subject in the hands of the bankrupt himself. By the act of bankruptcy they only get the legal right. The bankrupt himself had the legal right before the bankruptcy, but he could never retain the thing against the lien, without paying the money borrowed. So neither can the assignees. Nor if the party obtains the possession, can they get it from him without paying the money advanced. For the retaining the thing agreeable to a lawful stipulation between him and the bankrupt, previous to the bankruptcy, can never even in a court of law be said to be a wrongful conversion. If the case rested on principles of reasoning only I should have very little doubt; but this reasoning is likewise supported by authority. I will first premise, as a ground, that whatever may be set off in a court of equity, on the ground of *lien*, may likewise be set off in an action of trover. This was expressly laid down by Lord *Mansfield*, in the case of *Green v. Farmer*, 4 Burr. 2218. Taking that position to be law, the case of *Brown v. Heathcote*, 1 Atk. 160. applies very strongly to this case. There *Williams* and his partner gave a bond to *Heathcote* for 1200*l.*, and the same day by deed assigned to him the goods in two ships then at sea, and also delivered to him thirteen bills of lading and policies of insurance, the latter of which were indorsed to him, but the bills of lading were not: and a bill being brought by the assignees of *Williams*, insisting that, as *Williams* had acted as visible owner of the ship and cargo, which were never put into the possession of the defendant, the plaintiffs were entitled to them for the benefit of the creditors. But the court was of opinion that, every thing which could shew a right to the ship and cargo being delivered over to *Heathcote*, the bankrupt could no longer be said to have the order and disposition of them, and therefore the case did not fall within the meaning of 21 Jac. 1. c. 19. and consequently that *Heathcote* had a right to retain the ship and cargo till the money was paid. That case is very similar to the present; for though there was an *assignment* of the bill of lading, and here only an *agreement* to assign, yet that makes no difference, as neither conveys more than the equitable title. There is a case in *Brown's Rep.* 125, of *Falkener v. Case*, which, though very shortly reported, seems to apply to the present. But I cite it from a MSS. note which is somewhat more full;

In *Chancery*. November 21st, 1781. *Falkener*, executor of *Crowder* against *Case* and Others.—*Case* owing 6000*l.* to *Crow-*

1788.

LEMPRIERE
against
PASLEY.

1788.

LEMPRIERE
against
PASLEY,

der on bond, with some arrears of interest, for securing the same in April 1777 gave Crowder a bill of sale of three ships, the *Banett*, which had lately sailed from *Liverpool* to *Jamaica*, the *Fancy* then lying in the dock at *Liverpool*, and the *Anna*, then building. "And all policies of insurance, sum and sums of money whatever then insured or to be insured upon the said ships or vessels, or any of them, to hold the said three several ships or vessels and other the premises to the testator his executors, &c., as his and their own proper goods and chattels". And *Cafe* covenanted that he would "from time to time at his own proper charges cause the same three ships to be sufficiently and properly insured, and so continue the same insured, whilst the same vessels should respectively be out of the said port of *Liverpool* upon any voyage whatsoever; and in case of any loss, should and would pay the money due, and to be recovered upon any such policy or policies of insurance to the said *T. Crowder*, his executors, &c. for the purpose of paying and satisfying to him or them the said 6000*l.* and all interest, and other money due and to become due to him on the said bond"; with a proviso for redemption before 1st August then next. The *Fancy* and *Anna* lay at *Liverpool* for some time after the bill of sale was executed. The *Banett* returned to *Liverpool* and sailed on another voyage, but *Crowder* never took possession of any of them. Soon after the *Banett* had sailed in January 1778, *Crowder* applied to *Cafe* to deliver up to him the several policies he had covenanted to get effected on the respective ships. It then appeared that *Cafe* had insured in *London* upon the ship *Fancy* 2000*l.* and a large sum upon her cargo in the same policy with one *Barclay* an insurance broker, who retained the policy as a security for the premiums, and also for the balance due from *Cafe* on his general account; and *Cafe* was therefore not able to deliver it over to *Crowder*, but he informed him that such insurance had been made, and offered to give him an order to recover in case of loss, and deliver to him another policy on the same ship for 600*l.* which had been effected in *Liverpool*. On the 23d March 1778 a commission of bankrupt issued against *Cafe*, and it was not disputed in the arguments that he had committed acts of bankruptcy in November 1777, but it was not so alleged in either the bill or answer. The ship *Fancy* was captured by an *American* privateer on the coast of *Africa* on the 6th March 1778, and as soon as *Crowder* heard of

of it, which was not till the beginning of *July* 1778, he applied to *Barclay* to give up the policy, who refused unless he would pay the balance of the account due from *Cafe*, which was 779*l.* 11*s.* and indemnify him. *Crowder* declined to do this, but the assignees acceded to these terms and possessed themselves of the policy, and thereupon received from the bulk of the underwriters the amount of their subscriptions. *Crowder* filed a bill in *Hilary* 1779 against the bankrupt and the assignees, praying that the assignees might be deemed to account with him for all the money received from these two policies, and, in case any part of such money was received, that the assignees might either recover and pay the same to him, or deliver the said policy of insurance in their hands to the plaintiff, and consent to his receiving the money due on both policies, and empower him to make use of their names for recovering and receiving it on the plaintiff's indemnifying them therein; which he thereby agreed and offered to do. After the defendants had put in their answer, *viz.* 26th *February* 1780, *Crowder* died. And the suit was revived and carried on by the executor of *Crowder*. *Kenyon* for the plaintiff stated the facts, and acknowledged that no delivery accompanied the bill of sale; and that from not having taken possession the plaintiff must give up all claim to the ships. The whole question is upon the policy of the ship *Fancy*; and he contended that though the ships did not pass, the policies of insurance did pass. By the bankrupt laws nothing passes to the assignees, but what the bankrupt was in possession of at the time of his bankruptcy clear of any special lien thereon. The Solicitor General (*Mansfield*) for defendant.—In this case if the bankrupt had remained solvent, it would have entitled *Crowder* to come for performance of the agreement. This policy, (meaning that made in *London*,) rested in the hands of the bankrupt. *Ryal v. Rowles*, 1 *Vez.* 348, 375. This is merely an equitable assignment of the policy, and within the case of *Ryal v. Rowles*. But besides these defendants insist on an act of bankruptcy so early as *November* 1777, and if that were in *Nov.* 1777 it is incumbent on the plaintiff to make out that the covenant in 1777, unaccompanied with delivery, was an actual assignment. *Thompson* for the plaintiff.—It is perfectly immaterial whether the act of bankruptcy was in *November* 1777 or not, for the plaintiff's title depends on the deed in *April* 1777. This is a clear assignment in equity of all policies to be made subsequent to that deed. The policy on the *Fancy*

1788.

LEMPRIERE
against
PASLEY.

1788.

LEMPRIERE
against
PASLEY.

was made in *July* 1777, and the assignees are bound by all the covenants of the bankrupt. *Taylor v. Wheeler.* 2 *Vern.* 564. The *London* policy was not in the custody of the bankrupt, but in the possession of *Barclay*, who had a special lien upon it. *Crowder* was in the situation of a second mortgagee of this policy. This is not within the 21 *Jac.* 1. being a chose in action. In case of a pawn the condition is personal, and the executor of the pawner cannot redeem it. *Yelv.* 178. Lord Chancellor asked, whether, in case of a pawn, the assignees can claim it if the bankrupt does not redeem it prior to the act of bankruptcy? In case of ships at sea, where actual possession cannot be given, symbolical possession is sufficient. *Kenyon*, in reply, observed, that if a person, prior to his bankruptcy, enter into a covenant that binds the property, that property is subject to the covenant. The statute of *James* does not apply to the argument the Solicitor General draws from it. In this case the property was not in the hands of *Cafe*, nor could furnish him with false credit. It is said *Barclay* held the property for the bankrupt: but he held it for *Crowder*. This policy was in fact a pledge, or pawn. And if the statute of king *James* had not existed, there never was a clearer case. The Lord Chancellor admitted, that if the question had been concerning a bond, or any chose in action, that had remained in the possession of the bankrupt at the time of the bankruptcy, it would have been within the statute of king *James*. The question therefore is upon the application of that statute to this case. In *April* 1777, *Cafe*, having assigned over the vessel, assigned all policies to *Crowder*, in consideration of a debt due at the time, and therefore, as to consideration, the transaction is valid. In *July* following, he made a policy on the *Fancy*, but the broker, being then his creditor, would not part with the policy till he had been paid what was due to him; and *Cafe* agreed that the policy should lie with the broker as a security for paying that demand. There seems to me to be no difference in cases where effects, which have been in possession of the pawner, are pledged, or goods that he has a property in are left in the hands of a third person; for I consider them equally as pledges. Taking this as a pawn, I should consider, first, what the case would be if the statute of *James* did not affect it; and then what effect that statute has. If there were no such statute in the present case, it would be clear that the plaintiff did obtain that interest which he

he is now seeking in the subject. The policy of insurance was in *Barclay's* hands, and *Crowder* in equity acquired a right in that policy; and this court would not turn him round to seek his relief against *Cafe*. It is clear, abstracted from the statute, that whatever binds a subject of property in the hands of the bankrupt, will bind it in the hands of the assignees; their title is merely derivative, and they take the property of the bankrupt subject to all equitable liens on it, that bound it in the hands of the bankrupt; and here, if there had been no such statute, the assignees would have been bound by this contract of the bankrupt. The question therefore is, secondly, whether this statute affects this case. The words are, "if any person at the time he shall become bankrupt shall by the consent of the true owner have in his possession any *goods or chattels*, whereof he shall be the reputed owner, the commissioners shall have power to dispose of the same for the benefit of the creditors." The question therefore is, whether the bankrupt's interest in this subject falls under the words *goods and chattels* in the act; whether that interest resided in the bankrupt in any right of form or possession at the time of the bankruptcy. His right was merely equitable to redeem *Barclay*. *Barclay* had possession against the bankrupt, and the bankrupt had only a right to redeem. The bankrupt, when solvent, assigned all his interest to a stranger. It is objected that he did not then deliver possession, but he had not the possession to deliver; he had barely the right of redemption: he did therefore, as it seems, all that he could do, assign all his equitable right to the plaintiff. The statute is to be considered as a *jus positivum*, and here it is impossible to charge the assignee of this equity with having left the possession of the thing assigned in the hands of the bankrupt. In cases where ships are at sea, symbolical possession is allowed, and this is much clearer of the objection of possession on the behalf of *Crowder*. But it is argued, that *Crowder* should have given notice to *Barclay* of his equitable interest, which would have been publishing to the world that the property did not belong to the bankrupt. The first answer is, that there was not a scintilla of property in the bankrupt. And, secondly, supposing notice had been given, it would have been a transaction merely between *Crowder* and *Barclay*. The consequence is that the assignees must account for all money received on *Barclay's* policy, as far as it affected the ship, but not on the other policy underwritten

1788.

LEMPRIERE
against
PASLEY.

1788.

LEMPRIERE
against
PASLEY.

at *Liverpool*, which remained in the bankrupt's hands, and delivered by him subsequent to the act of bankruptcy committed, if the act of bankruptcy preceded the delivery of that policy by the bankrupt to *Crowder*;—and the parties to be at liberty to try (a) that fact if they think proper. That case applies strongly to the present.

It might be a great inconvenience to commerce, if it were to be laid down as law, that a man could never take up money upon the credit of goods consigned, till they actually arrived in port. There seems to be no inconvenience on the other side, nor can it be any inlet to fraud; for no other person can be taken in to lend money on the credit of the cargo, after the party has delivered over all the documents to him who has the first lien. Therefore on the whole, we think the verdict wrong, and that there ought to be a new trial.

Rule absolute.

(a) It never was tried, the fact having been settled by two or three other trials at law before this decree was made, that Case committed acts of bankruptcy two or three months before the delivery of that policy to *Crowder*.

MASTERS, *Qui Tam*, against DRAYTON.

In a *qui tam* action on the statute of usury against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or repaid the money; notwithstanding he is ready to release to his assignees all benefit which may arise from the discharge of this debt in particular, and all claim to allowance and surplus in general; and notwithstanding the assignee has proved his demand for the money lent under the commission.

THIS was an action for usury, in taking more than legal interest on 500*l.* from the 10th *April* to the 20th *October* 1786, and tried at the last Spring Assizes for the city of *Gloucester*, before *Heath, J.* To prove the usurious contract and taking, *Lightfoot*, the borrower of the money was called; upon the *voir dire* it appeared that he had not repaid the money, that he was a bankrupt, and had not obtained his certificate; that the defendant was his assignee, and had proved this debt under the commission; whereupon the bankrupt (the witness) offered a release to the assignees of all interest, dividend, profit, surplus, &c. which might arise from the discharge of this debt, or from the increase of the fund by the deduction of it; and also a general release of all claim whatever to allowance and surplus. It was then objected by the defendant's counsel, first, that a certificate must be obtained before the bankrupt could be a witness, or the release operate to make him one; and secondly,

that

that the prospect of obtaining a certificate by encreasing his fund was an *interest*, which rendered the witness *incompetent*. To which it was answered, that if a certificate had been obtained, the release would be unnecessary; and that the prospect of obtaining a certificate was only an *influence*, which went to his *credit*, and not to his *competence*. But the learned judge being of opinion that the release was only applicable to a debt due to the bankrupt, which he might release, or at least his share or advantage in or from it, rejected the witness, giving the plaintiff's counsel leave to take the opinion of this court upon that point. The plaintiff having been nonsuited,

Milles now moved the court to set aside the nonsuit, and to grant a new trial; contending that it was immaterial by what means the stock or fund of the bankrupt was encreased, if he discharged himself from all benefit arising from such encrease. In *Nares and Another, Assignees of Salmon against Saxby (a)*, a bankrupt was called as a witness on behalf of the assignees, to whom he had given a release, but not such an one as is generally given in these cases, which is a release of all such allowances as he may be entitled to under the commission. *De Grey, Ch. J.* determined that a general release was sufficient, as it discharged him from receiving any sum of money from the assignees. So in *Evans v. Gold (b)*, it is said, that the bankrupt cannot be a witness to swear property in himself, or a debt due to himself, without a release of his share in the surplus and the dividends, for else he is plainly interested; which indisputably proves that such a release will render him a competent witness. The release therefore in the present case discharged the bankrupt of all interest which could affect him from the destruction of this debt of 500 *l.*, supposing that the action should be considered as working such an effect. But upon the authority of *Abrabams v. Bunn (c)*, this could not work such an effect. This created only an influence, which went to his credit, and not to his competence: for though the bankrupt was still liable to an arrest for this debt, yet that was only an influence, and not an interest; and a distant influence too, because the defendant had proved the debt under the commission, and had acted as assignee under it. But

1788.

MASTERS
against
DRAYTON.

(a) *Sittings at Guild. after Hil. 19 G. 3.*
C. B. cor. *De Grey, Ch. J.*

(b) *Bull. N. P. 43.*

(c) *4 Burr. 2251.*

1783.

MASTERS
against
DRAYTON.

The Court were of opinion that this objection rendered the witness incompetent, and that he could not be examined before he obtained his certificate; for notwithstanding the defendant had proved his debt under the commission, which he may do for the very purpose of preventing a certificate, that was no objection to his bringing an action at law, and arresting the bankrupt for the whole debt.

Rule refused.

Friday,
May 2d.

DOE, on the Demise of HANNAH CLEMENTS,
against COLLINS.

A. being tenant for years of an house, gardens, stables, and coal-pen, bequeathed in the following words; "I give the house I live in and garden to B." The stables and coal-pen, occupied by A. together with the house, passed without being expressly named, tho' the testator used them for purposes of trade as well as for the convenience of his house.

THIS was an ejectment for two granaries, stables, and sheds, and an acre of land in *Reading*, tried before *Heath, J.* at the last Assizes held there, who reported as follows on a motion for a new trial. By indenture of assignment, dated the 29th of *October* 1749, between *John Merick* of the first part, *Algernon Piercy* of the second part, and *William Clements* of the third part, reciting several assignments of the after-mentioned premises to *Merick* and *Piercy*, they granted and assigned unto *William Clements* the younger, of *Reading*, timber merchant, the messuage and garden formerly in the occupation of one *Wiginton*, and then in the occupation of the said *Clements*, and also all the four messuages or tenements in the occupation of certain other persons therein mentioned, and also the garden plot and piece of ground before the house, and also all that the said 36 feet of ground in length from east to west, and 18 feet in breadth from north to south, whereon the said wash-house formerly stood, and all those two stables, with the granaries over the same, in the occupation of certain other persons therein mentioned, for the residue of several terms of years unexpired. On the 2d of *December* 1780 *William Clements* by will devised (*inter alia*) to *Hannah Clements*, the lessor of the plaintiff, as follows; "To *Hannah Clements* I give the house I live in, and garden, and also the household goods, as long as she lives; and the house that *Mrs. Purshouse* lives in, not to be disposed of; to go to her children afterwards; and the four tenements below the house I live in." The said *William Clements* died in 1783. It was admitted that the house and gardens mentioned in the will are the same as those which passed by the several

veral deeds. The testator was a master bargeman and boat-builder, and inhabited the house in question. He let out the four tenements mentioned in the deed, but occupied the stables and granaries and the gardens in front and to the east side of the house; there was a pig-sty at the corner of the stable-yard, and a paling which encompassed all the premises, except the coal-pen, which was on the other side of a road running near the house. A small door led from the court-yard into the stable-yard, but it was so blocked up with straw that it was useless, and the way used was round by the road into which the court-yard opened. There were bed rooms over the stables, which were used for the purpose of hay and straw lofts; and the testator used the stables for the horses employed by him in his trade. The coal-pen generally contained 50 chaldron of coals: all the coals not sold out of his barges were laid there; and the testator put the coals which he took from the pen for the use of his family, by two or three bushels at a time, into a wash-house adjoining the house. His own consumption was not above three chaldron in a year. He had a yard for building boats about 300 yards from his house, and a timber-yard about the same distance. The defendant's counsel insisted that, as the premises mentioned in the declaration did not fall under the description of *house and gardens* as expressed in the will, and as in the purchase deed they are described to be in the occupations of different persons, they did not pass by his will. But the learned Judge stated that he was of a different opinion at the trial, because the testator occupied them together with his house and garden from the time of his purchase to his death. And he directed the jury to find a verdict for the plaintiff, with liberty for the defendant to enter up judgment of nonsuit, in case the court should be of opinion that his direction was wrong. The draught of the purchase deed, copy of the testator's will, and plan of the premises, made part of the report.

Bower and *Simeon* were desired by the court to begin in support of their rule. Nothing passed by this devise of the *house*, except what was usually and necessarily occupied with it for domestic purposes. Whatever was used therefore by the testator merely in the course of his trade cannot be considered as falling under this description. The mere circumstance of his having occupied the various premises in question at one and the same time cannot vary the question, or alter the nature of the pro-

1783.

Doz
a. inst
COLLINS.

1788.

DOE
 against
 COLLINS.

perty; for suppose a trader had warehouses in different parts of the town which he occupied in his trade at the same time as his house, it could not be pretended that a devise of his dwelling-house would pass such tenements. Now that was the only way in which the testator occupied these stables and the coal-shed. There is a distinction between the words *messuage*, and *house*. The latter imports nothing but the mere place of abode; but the former will convey the garden and curtilage occupied with it, though *cum pertinentiis* be not added. *Cro. Eliz.* 89. There was a similar devise in 2 *Cb. Cas.* 27. but it was never decided. In *Keilway* 57. it is said that the word *messuage* may extend to curtilage, but *house* can extend to *buildings* only. It is true that the premises in question consist of buildings, but they are not such buildings as fall within the description in *Keilway*. Lord Coke, in his *Comments on Littleton*, 5. b. says, that by a grant of a *messuage* the orchard, garden, and curtilage pass. It is true he adds that an acre or more may pass by the devise of a *house*; but this latter part is not warranted by the authorities, all of which are collected by Mr. *Hargrave* in the last edition of *Co. Lit.*: from thence it appears that all the cases are of *messuages*, or of a house *cum pertinentiis*; and when Lord Coke mentions the subject again, *Co. Lit.* 56. b. he does not take any notice of the word *house*, but confines his comment to the word *messuage*. But supposing that appurtenances would pass by a devise of a house without any words of addition, still it must appear that the premises in question were appurtenant to this house. The mere circumstance of their being held at the same time by the same person is not sufficient. Strictly speaking, nothing can be appendant or appurtenant that has not been so immemorially; but at least it should appear that these premises had been annexed to the house when built, and had always been held together with it. But it is stated negatively here that previous to the year 1749 they were no part of the premises on which the dwelling-house stands, nor in the same occupation, but were purchased by the occupier of the dwelling-house at that time. In *Nicholas v. Chamberlain* (a) a conduit and water-pipes in adjoining land were held to pass by the words *house with the appurtenances*, because they were both *necessary*, and *quasi* appendant; but here these premises are neither necessary for the enjoyment of the house, nor are they joined to it as the water-pipes

(a) *Cro. Jac.* 121.

in that case. And in *Bryan v. Wetherhead* (a) a grant of a tenement *cum pertinentiis* was held not to pass part of a shop which had been annexed to an old shop, and held with the house for thirty years, because it had not altogether been used with the house, or reputed as parcel thereof. That case goes farther than the present, because the word appurtenances was added. The way which led to the stables through the yard having been so blocked up as to be rendered useless is a circumstance in the case to shew that the occupier himself did not consider them as appurtenant to the house. Neither does there appear any probable intention in the testator that these premises should pass with his house. Had the devise of the house been to a person who he intended should carry on his trade, such an intention might fairly enough have been presumed; but that is not the case; and the addition of the words here, namely, the house *I live in*, shews plainly that the bequest was intended to be confined to the actual *dwelling*-house alone. Where there is no actual disposition made in words of a personal chattel, nor any probable intent coupled with ambiguous expressions, the executor is entitled to the same preference as the heir is with regard to real estate; therefore the court will be enclined to give him every thing that is not expressly or by necessary implication given away. *Bro. Ch. Cas.* 331. In the case of *Pratt v. Jackson* (b), in consideration of a provision made for the wife under marriage articles, it was provided that she should have no claim out of her husband's real or personal estate, with a proviso that it should not extend to household goods, &c. This exception was held by the Chancellor to extend to household goods in another house than that actually occupied by the husband before his death; but that decree was reversed in the house of lords, because the meaning of the parties evidently was that it should be confined to the house in which he resided. Both these decisions are in favour of the executor; for in the first, the Chancellor said that in doubtful cases it was better to adhere to the strict letter, and not to make constructions never perhaps intended to be made by the party; the second shews that where it did not appear that any thing more was intended to pass than the household goods in one particular house, nothing more should pass, although the words might comprehend more.

Milles, contra, was stopped by the court.

(a) *Gro. Car.* 17.

(b) 2 *P. Wms.* 303.

1788.

Doe
against
Collins.

1788.

DOR
against
COLLINS.

ASHHURST, J.—The testator's intention appears to have been to give by the bequest of his house, without the word “appurtenances,” every thing which was in his occupation, as proper and convenient for the occupation of the house. The distinction between *house* and *messuage* seems too subtle to be relied on at this time; for I think that whatever would pass by the one, would equally pass by the other. It is well known that on an indictment for a burglary in a dwelling-house, proof of breaking and entering a stable, which is considered as part of the dwelling-house, will support the indictment; and that is stronger than the present case. Then it has been said that the stable and coal-shed were not appurtenant to the house, because in order to make them so they should always have been occupied with the house: but that is a very forced argument; it is not like the case where a person claims a prescriptive right against another; there it is necessary to shew that it has existed time out of mind. But when a person uses the words as a description of the thing which he intends to give, there premises which have been recently built and annexed to a house would pass as appurtenant to the house. It has been objected on the part of the defendant, first that the stables, and secondly that the coal-shed, did not pass under this bequest. With respect to the first, there is no sort of doubt, for the stables are within a ring fence which encloses the whole tenement together; and we cannot suppose that the testator intended to separate them, for then the stables would be in the occupation of one person, and the stable-yard of another. And though the devisee was not engaged in trade, yet she was in a degree of opulence, and therefore the testator might have thought that she would have occasion for the stables. The difficulty is greater as to the coal-shed: and I should have doubted whether this would have passed by the bequest, if it had been proved to have ever been annexed to any other tenement. But as no proof of that sort was given, we must take it for granted that it never was annexed to any other tenement: and then a very slight degree of evidence is sufficient for the purpose of shewing that it should pass with the house. And though it is stated that the coal-shed was used by the deviser in his coal trade, yet it appeared that he likewise used it for the purpose of keeping coals to be consumed in his own house; and though that is a slight circumstance, yet it is an additional reason for saying it shall pass as part of the house.

BULLER,

BULLER, J.—In construing wills we do not look at technical words so much as the testator's intention, which can only be collected from the whole will. Then in determining what passed under the bequest in question, it is material to consider the situation of the devisor. He had premises in different parts of *Reading*, and he was in the possession of a house, and the premises now in dispute, which he had occupied with his house from the year 1749; then in common parlance they are considered as part of his house. This would not be a sufficient description in writs, but in common intendment it is; and a person must distinguish very nicely to take the difference. With respect to the stables which were within the ring fence, I think there cannot be the least doubt. It does indeed at first seem more doubtful whether the coal-pen passed by this devise; but I think on considering the whole together that it did. The testator first says "To *Hannab Clements* I give the house I live in and garden, and "the house that *Mrs. Pursbouse* lives in, and the four tenements below the house, in, &c." this clearly shews that he meant to give every thing in his own occupation; for in his bequest he particularly described every thing around him, besides that which was in his own possession, which is a strong argument to shew that he thought that every thing which was in his own occupation would pass under the bequest of the house. It has been said in the argument that he had other property which he has not disposed of by the will. But as the case stands, we must take it otherwise, and that he is by will disposing of his whole property; then not having particularly bequeathed the coal-pen, that also must pass under the general words.

GROSE, J.—I consider this question in the same way in which the case in *Pr. Williams* was considered in the House of Lords, namely, as a question of intention. Though *prima facie* there appears to be some doubt whether the coal-pen passed under this bequest, yet considering the intention of the testator, I am of opinion that the whole which he had in possession must go to the devisee *Mrs. Clements*. It is clear that he meant to give her more than the house in which he lived, for he also gave her the house in which *Mrs. Pursbouse* lived, and four tenements besides; the two former of which he gave to *Mrs. Clement's* children; therefore he meant to give her a permanent interest. Besides there are many separate bequests of different parts of his property to different persons, and there is no specific bequest of the coal-pen.

1788.

Doct
against
COLLINS.

1788.

Doz
against
COLLINS.

in question; which is a strong circumstance to shew that he thought it would pass by the bequest of his house, as he had occupied them together since the year 1749.

Rule discharged.

The KING *against* The Justices of SURRY.

Saturday,
May 3d.

No appeal lies to the sessions from a conviction of two justices for an offence under 25 G. 3. c. 72. s. 9. notwithstanding it contains a general clause of reference to all former excise laws, and incorporates all the powers, &c. provided by 12 Car. 2. c. 24. or by any other law relating to the excise or inland duties under the management of the commissioners of excise for managing, mitigating, or adjudging, the duties, or penalties, granted by this act.

A RULE having been obtained to shew cause why a *mandamus* should not issue, directed to the justices of Surry at their sessions, to compel them to hear and determine an appeal made by *Hannab Pleck*, who had been convicted on 25 Geo. 3. c. 72. s. 9. for printing cotton before it was measured and marked by the proper officer of excise, according to the directions of the act;

The *Solicitor General*, *Wood*, and *Shepherd*, now shewed cause. There is a difference between a *certiorari* and an appeal; the former must be taken away by express words, because it is a common law right; but the latter does not lie, unless expressly given, for the same reason, because it is not a common law right. This conviction is founded on the 9th section of the 25 Geo. 3. c. 72. and if any appeal lies in this case, it is given by the 33d. section: but on considering the legal effect of that clause, no such power will be found to be thereby given. It enacts that all powers, authorities, rules, penalties, forfeitures, clauses, matters, and things, which in and by the 12 Car. 2. c. 24. or by any other law now in force, relating to the revenue of excise, or inland duties under the management of the commissioners of excise, are provided or established, for securing, enforcing, managing, &c. mitigating, or recovering, adjudging, or ascertaining, the duties, or penalties, thereby granted, shall be exercised, applied, and put in execution in and for the managing, mitigating, adjudging, ascertaining, recovering, and paying, the several duties hereby granted, as fully and effectually as if all and every the said powers, &c. were particularly repeated, and again enacted in this act. This clause, which makes a specific allusion to the 12 Car. 2. c. 24., and all other acts relating to the excise, must mean all other acts founded on the same principle; and the 12 Car. 2. is only put by way of example. Now the 45th. section of that act declares, that all offences committed against that act, within the

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

505

the limits of the excise office in *London*, shall be heard and determined before the commissioners, &c. And that all offences in the country shall be heard and determined by two justices of the peace; and in case of their neglect or refusal, a power is given to the sub-commissioners to hear, &c. the same; and if the party finds himself aggrieved by the judgment of the sub-commissioners, he may appeal to the justices at the next quarter-sessions, whose judgment therein shall be final. So that a reliance is placed in the justices of the peace, which is not placed in the sub-commissioners of excise; for an appeal to the quarter-sessions is given from the judgment of the sub-commissioners, but not from that of the justices; and it is only in case of their neglect or refusal that the sub-commissioners have a power to hear and determine the matter at all. The pervading principle of that act was never to trust to the judgment of those persons who are employed in collecting the duties, but to make the decision of the magistrates final in whatever stage of the business it came before them. There was no jealousy that the justices would be too ready to convict; and therefore the same precaution was not necessary in giving an appeal from their judgment as from that of the sub-commissioners. Thus it stands clearly on the 12 *Car. 2. c. 24.* taken by itself: but the legislature have themselves given an exposition, which establishes this point, that when in any of the excise laws there is a general clause of reference to the 12 *Car. 2. c. 24.* and all other excise laws, with respect to the mode of collecting the duties, or recovering penalties, such general clause alone does not give an appeal. For by the 9 *Ann. c. 11.* certain duties are imposed upon hides, and skins, vellum and parchment; in the 36th. section of which a power is given to two justices to hear and determine offences against that act; and an appeal is given from the judgment of the justices to the quarter-sessions. Now if an appeal would have lain by virtue of the general clause of reference (a) to the excise laws, without such an express power in this statute, it was nugatory to give it. Then followed the 6 *Geo. 1. c. 21.* relative to spirits; by which the commissioners of excise in *London*, and two justices of the peace out of the limits of the chief office of excise in *London*, may proceed to condemnation, and their condemnation shall be final, and not liable to an appeal. And the 22d. section of the same act declares that every seizure of sweets made in pur-

1788.

The KING
against
The Justices
of SURRY.

(a) S. 37.

suance

1788.

The KING
against
The Justices
of SURRY.

force of that act, and also every other forfeiture after the 1st. Aug. 1720, made in pursuance of any act whatsoever relating to the duties of excise, or to any other duties under the management of the commissioners of excise, shall be proceeded upon, heard, and determined, by the same ways, and in such manner as is directed upon seizure of spirits, and such proceedings shall not be subject to appeal. And a question afterwards arising whether this should extend to offences relating to the duties on malt, and to the duties on hides, and whether it repealed the power of appealing in those cases; it was enacted by the 1 Geo. 2. st. 2. c. 16. s. 3. that the right of appeal in those respective cases was not taken away. So that there was no appeal but from a conviction for offences relating to the duties on malt, and hides, because the legislature restrained the operation of the general clause in the 6 Geo. 1. as to those two cases. The only doubt there was, whether the appeal was taken away in those two cases; and the act of 1 Geo. 2. was passed to restore that appeal; but it restored no other right of appeal in any other case. Then the 6 Geo. 1. c. 21. extends to all those cases in which an appeal is not expressly given. If that clause had been transcribed into the 25 Geo. 3. c. 72. there could be no doubt but that no appeal would have lain in this case. Now the general clause of reference s. 33. incorporates all former excise laws into this, with respect to the mode of suing for and recovering penalties incurred by this act; it is therefore precisely the same as if the appeal had been denied in express terms. The only word in this clause which can be contended here to give the appeal is "adjudging"; but that is not sufficient to raise such a jurisdiction; it must be given by express words. And if that word gave an appeal, it would not be necessary to give an appeal in express terms in any act where that word is inserted in a general clause of reference to the former excise laws; yet notwithstanding this word is inserted in several acts of parliament, where the duties imposed by them are placed under the management of the commissioners of excise, an appeal is specially given by them; as in 20 Geo. 2. c. 10. and 21 Geo. 3. c. 31. It therefore appears upon the whole that at the time of passing the 6 Geo. 1. no appeal existed but in the two excepted cases. Then a general clause of reference in any subsequent statute, as to the mode of suing for and recovering penalties, can only relate to the general provisions of former laws, and cannot be extended to the particular

ticular exceptions; for that would be making the exception co-extensive with the rule itself, and destroy the very idea of its being an exception.

Erskine in support of the rule. All the excise laws, being in *pari materia*, are to be taken into consideration together, as forming one general system. The 33d section of the 25 Geo. 3. c. 72. enacts that all and every the powers, &c. matters and things in and by the 12 Car. 2. c. 24. or by any other law now in force, relating to the excise, shall be applied, &c. to this act. So that the argument on the other side would only have applied if this clause of reference had stopped at the act 12 Car. 2. but it proceeds to refer to all other excise laws, &c. Therefore all other excise laws must be taken to be incorporated with this. By the act 12 Car. 2. c. 24. it is enacted that all offences committed beyond the limits of the chief office of excise in London shall be heard and determined by two justices of the peace residing near the place, (but it does not say that their determination shall be final,) and in case of their neglect or refusal, then the sub-commissioners are empowered to hear and determine the same; and if the party finds himself aggrieved, he may appeal to the justices at their quarter sessions, whose judgment therein shall be final; so that under this statute there can be no final determination but at the Quarter Sessions. But if the court should think that an appeal was not given by this statute from the judgment of two justices, it must have been omitted by mistake, for the legislature intended to give an appeal in all cases on that act. The 12 Car. 2. was not originally a prospective law; it only gives an appeal from judgments upon that statute. The next act is 9 Ann. c. 11. which gives a duty on hides, &c. in which it was necessary to give an appeal in express terms (a), because none was given in the statute of Charles, in cases that might arise on any act of parliament subsequent to it: and the 39th section of 9 Ann. c. 11. gives power to the said respective justices to mitigate or lessen any such penalties as they in their discretion shall think fit. This statute of Anne then must be considered as incorporated with the present act, by virtue of the general clause of reference (b), which enacts that all forfeitures shall be sued for, recovered, levied, or mitigated, as any fine or forfeiture by any law now in force; thus the justices at the quarter sessions have a power of mitigating the penalties under this act: but that can only be effected on an appeal to the

1788.

The King
against
The Justices
of SURRY.

(a) 8. 36.

(b) 25 Geo. 3. c. 72. s. 34.

1788.

The KING
 ag. a?
 The Justices
 of SURRY.

sessions. In the case of *The King v. The Commissioners of Excise* (a), the crown officers insisted that by a general clause of reference in the act then in question all the former excise laws were incorporated into it: then if it can refer to all former excise laws at the option of the crown, it should equally relate to them at the option of the subject; the privilege should be mutual. The 34th section in this act is perfectly absurd and nugatory, if this construction be not the true one; for though it relates to former acts, with respect to the mode of recovering and mitigating penalties, yet they cannot be sued for recovered and mitigated in the same manner as they may be under those acts of parliament to which it refers. It has been argued that the two cases in which appeals lay, namely, on convictions for offences relative to the duties on malt, and on hides and skins, were, at the time of passing the statute 1 Geo. 2. exceptions to the general rule, and that the clause in the 25 Geo. 3. which refers to former excise laws, cannot extend to particular exceptions: but it is observable, that between the 12 Car. 2. c. 24. and the 6 Geo. 1. there were only those two cases which were the subject of excise laws (b). Therefore it appears by the 1 Geo. 2. st. 2. c. 16. s. 3. which is an explanatory act, that an appeal lay in all cases of forfeitures against the excise laws, except for offences against the 6 Geo. 1. c. 21. s. 20. where it was expressly taken away. And as there were no other acts on which the statute of 1 Geo. 2. c. 16. could operate, besides the 12 Car. 2. and 9 Ann. the explanation was necessarily confined to these statutes.

Cur. adv. vult.

ASHHURST, J. now delivered the opinion of the court.

This was a motion for a *mandamus* to the justices of Surry, to receive and hear an appeal of *Hannab Plank* and others against a conviction on the 25 Geo. 3. c. 72. which imposes a duty on cottons, muslins, &c. for certain offences committed against that act. And the question is, whether an appeal lies in this case from the judgment of two justices. It was contended by the counsel who made this application that an appeal was virtually given by the 34th section of this act of parliament, which by reference incorporates all the remedies given by any excise laws, and that the power of appeal and of mitigating penalties are given by some of the excise laws. On the other hand it was contended that no appeal lies but where it is given

(a) *Ante*, 383.

(b) *Vide* 8 Ann. c. 9. s. 5. 27, 8.

in express words. It would be endless to state all the acts that have been made upon the subject, but I will just shortly mention such as seem to have a more immediate relation to the subject. The 12 Car. 2. c. 23. and 12 Car. 2. c. 24. which are usually called the hereditary excise acts, give an excise on liquors of various denominations, and in these acts an appeal is expressly given from the judgment of the commissioners and sub-commissioners, but not from the judgment of the justices. And it appears plainly from 15 Car. 2. c. 11. s. 19. that it never was the intention of the legislature to give an appeal from the judgment of justices; for speaking on the subject of costs upon appeals, it says, yet in case the first judgment is affirmed, the party appealing shall pay costs to the commissioners, or sub-commissioners; and yet this very act gives a jurisdiction to justices in certain cases. Now if the legislature had thought an appeal lay from their judgments, they would certainly have made the like provision as to them with regard to costs. The 9 Ann. c. 11. s. 36. is the first act which gives an appeal from the judgment of the justices; this act only relates to hides, skins, parchment, and vellum. In the 12 Ann. c. 2. the malt act, there is a clause as to the recovering of penalties, &c. which incorporates the statute of Car. 2. and all other laws then in force, relating to the revenue of excise, upon beer, ale, and other liquors. Yet by the 37th section, there is an express power given to appeal from the judgment of the justices to the quarter sessions; which shews that the legislature thought the clause of reference would not have given the right of appeal in that case. By 6 G. 1. c. 21. which relates to malt and the distillery, there is a clause (s. 22.) which enacts that all seizures of sweets, and every other forfeiture, and forfeitures, which (after a particular day) shall be made by virtue or in pursuance of that act, or any act whatsoever, relating to the duties of excise, shall be adjudged as prescribed by that act; and that such proceedings *shall not be liable to appeal*. A doubt arose on this general clause, whether it did not take away the right of appeal from the judgment of two justices as to malt, hides, and skins, or vellum; and for clearing this doubt the 1 G. 2. c. 16. s. 3. declares that by the above statute the right of appealing in those cases is not taken away; from whence one may infer *that the legislature meant it should be taken away in all other cases*. And where it has been thought fit to be given, the legislature have in subsequent acts given it in express words; as in 20 G. 2. c. 10. and 29 G. 2. c. 14. But it seems generally by the whole tenor

1788.

The KING
against
The Justices
of SURRY.

1788.

The KING
against
The Justices
of SUREY.

tenor of the acts that no appeal lies from the judgment of the justices, unless expressly given. But it has been argued that the general clause of reference in 25 G. 3. adopts all former laws of excise, and therefore in as much as some former laws gave the power of appeal and mitigation, they are virtually included in this. But I think that this argument in its utmost extent will not hold. For it may as well be argued that as this clause of reference virtually incorporates all former excise laws, as to the mode of levying, &c. and there are some of these acts, which in terms negative the appeal, these laws are virtually incorporated; and therefore that the appeal is virtually negatived in this. The fair construction then to be put upon this act of 25 G. 3. c. 72. s. 34. which is the clause of reference in question seems to be this; that all the *general* powers and provisions given and made in acts *in pari materiâ* shall be virtually incorporated into this, but that such provisions as are always considered as special provisions shall not. The power of appealing from the judgment of the justices seems to be of this kind, and does not attach without being expressly given. This construction will prevent all the clashing and inconsistency which will occur if a different construction were to take place. As to the observation on the power of mitigation, the party does not, by this construction, lose the benefit, for the two justices will have power of mitigating whether the appeal lies or not. There may be another reason given, in confirmation of the opinion we have formed, were it necessary, which is this; on a perusal of the thirty-third and thirty-fourth sections of the act in question, the first of which relates to *duties*, and the latter to penalties and forfeitures, there appears a manifest difference in the penning of the two clauses; the latter of which enacts that all fines, penalties, and forfeitures, respecting the inland duties imposed by the act, shall be sued for, recovered, levied, or mitigated, by such ways, &c. as any fines, &c. may be sued for, &c. by any law of excise; dropping the words used in the former section, "or inland duties under the management of the commissioners of excise." This led me to apply to a person who has long been concerned in the business of the excise, to know what was the distinction generally understood between *excise laws*, and *inland duties under the management of the commissioners of the excise*. He said the difference they understood is this, that the law of excise is understood to relate only to *liquors*; and that inland duties under the management of the commissioners of excise are understood to relate

relate to *malt, dry goods*, and other articles, which have of late been put under their management. If this distinction holds, it would be decisive; for I believe there is not a single instance of an appeal being given in any case relating to liquors; but, however, we need not rely on this distinction, as we think the former reasons are perfectly satisfactory.

The rule therefore must be discharged.

WESTON *against* WITHERS.

1788.

The KING
against
The Justices
of SURRY.

Monday,
May 5th.

THE plaintiff, being nonsuited in a former action of trespass against the defendant for taking his goods as a distress for rent, brought this second action for the same cause, and sued *in formâ pauperis*, being a prisoner in the King's Bench. The costs of the former action amounted to 32*l.* which the defendant swore he could not levy, the plaintiff not having any goods.

Russell moved for a rule to shew cause why the proceedings in the second action should not be stayed till the costs of the former were paid.

Lewis shewed cause, and contended that this rule never held but in ejectments. But

The Court made the rule absolute; and Mr. Justice Buller read two cases (a) from the Master's note book, in which the like rule had been made in other actions than ejectments.

After a nonsuit in trespass the court will stay proceedings in a second action between the same parties for the same cause until the costs of the nonsuit are paid, notwithstanding the plaintiff be a prisoner at the time of bringing the second action, and sue *in formâ pauperis*.

(a) *Moulton, Qui Tam, v. Bingham, Hil. 17 Geo. 3. B. R.*—Cowper moved that proceedings in the present action might be stayed till the costs (129*l.*) taxed in a former action on the statute of bribery, between the same parties, in which action the plaintiff was nonsuited, should be paid. The plaintiff's attorney would neither pay the costs, or discover the plaintiff's place of residence. Harding shewed cause on an affidavit, which denied that the plaintiff's attorney refused to pay the costs, and saying he was ready to pay the same. *Per Curiam*. Upon payment of the costs taxed on the nonsuit within a week, let the rule be discharged; in default thereof, let it be made absolute.

Baldwyn v. Richards and another, Hil. 19 Geo. 3. B. R.—Cowper shewed cause why the proceedings in this action should not be stayed till the plaintiff had paid the costs taxed on a judgment as in case of a

nonsuit, and the costs taxed on the rule to shew cause why judgment as in case of a nonsuit should not be entered for not going on to trial in the former action. He observed that the present action, which was for a malicious prosecution, was for the same cause of action as the former, and said that such motions had often been denied. Wallace, Solicitor General, for the rule, admitted that such motions had generally been denied; but said that the plaintiff in this case had brought a writ of error to the judgment which had been non-pros'd, which shewed vexation. Lord Mansfield said that if the plaintiff had paid the costs on the rule being served, the defendant should have paid the costs of this application; and asked whether the party was ready to pay the costs now? To which no answer being returned, The Court made the rule absolute.

1788.

Monday,
May 5th.

The court will not stay the proceedings in an action against a sheriff's officer, on 32 G. 2. c. 28. f. 12. tho' a similar action has been commenced against the sheriff for the same offence.

PECHELL, Bart. *against* LAYTON.

THE plaintiff having commenced an action against *Martin*, the sheriff of *Berks*, to recover a penalty on the 32 G. 2. c. 28. f. 12. and another against the present defendant, who was the sheriff's officer, *Bower* obtained a rule to shew cause why the proceedings in this action should not be stayed, on an affidavit which stated that both actions were commenced for the same cause.

Lane now shewed cause, insisting that the plaintiff had a right to bring actions against as many defendants, who were concerned, as he pleased, provided he did not obtain satisfaction from more than one. So the holder of a bill of exchange may commence separate actions against the drawer, acceptor, and indorsers; and the proceedings in none of these can be stayed till he has recovered a judgment against one. But even if in such an action as the present the party grieved could not sue the sheriff and his officer at the same time, there is less reason for staying the proceedings in the latter, than in the former, action, because the officer is the sole cause of the complaint.

Bower, in support of the rule. This is not an action on a bill of exchange, where each of the parties liable may be sued separately; for this is an action to recover a penalty. Only one offence has been committed, and only one penalty can be recovered; and the party grieved should make his election either to sue the sheriff or the officer. But if both are to be sued, it should be by a joint action; otherwise the expence of both actions may be incurred, by the plaintiff's carrying down the records in both the actions to be tried at the same Assizes. And ultimately that expence must be borne by the officer; for he gives a bond of indemnity to the sheriff. But

The Court said, It might be a question whether each person offending were not liable to the penalty. But that if only one penalty could be recovered, there was no instance in which the court had interposed in this summary way; that if the defendant were entitled to any relief, he should put the matter upon record; and that there was less foundation for an application on the behalf of the officer than of the sheriff himself.

Rule discharged.

Lord MANSFIELD was unable to attend during the whole of this Term.

The END of EASTER TERM.

C A S E S

1788.

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Twenty-Eighth Year of the Reign of GEORGE III.

BARBER *against* LLOYD.

WOOD moved to set aside the bill of *Middlesex* in this case, because it was to answer the plaintiff in a plea of *debt*, instead of *trespass*, and also to a bill to be exhibited in a plea of *trespass* upon the case: But

The Court refused to grant a rule, on the authority of a case, which was read from the Master's note book, exactly similar to the present, in *Mich. 20 Geo. 3. B. R.*

Rule refused (a).

(a) The same application was also refused in *H. 24 G. 3. B. R.*

Saturday,
May 24th.

The court refused to set aside a bill of *Middlesex*, which was to answer plaintiff in a plea of *debt*, instead of *trespass*.

The KING *against* The Inhabitants of the Hamlet or Parcel of PENDERRYN.

Monday,
May 26th.

A PRESENTMENT had been made of a road by a justice of peace upon his own view under 13 *Geo. 3. c. 78. s. 24.* which, after stating that for time whereof &c. there had been and yet was a common and ancient king's highway leading from the town of *Swansea*, in *Glamorganshire*, to the town of *Llandilofowr* in *Carmarthenshire*, and that certain parts of it lying in the parish of *Langevelack* in *Glamorganshire*

A presentment under 13 *Geo. 3. c. 78. s. 24.* against a smaller district than a parish must state expressly how they are liable to the repair of roads.

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1788.

The King
against
The Inhabitants of
PENDERRYN

were out of repair, &c., stated that the inhabitants of the parcel or hamlet of *Penderryn*, in the said parish of *Langevelack*, the said common highway, so in decay, ought to repair and amend when and so often as it should be necessary.

This presentment was removed into this court by *certiorari* (a); and after verdict, it was moved in arrest of judgment, that it was not stated that the inhabitants of this district were bound to repair the road by any custom or usage.

J. Morris shewed cause against the rule, saying that the form of the presentment pointed out in the schedule to the act N^o. 32. had been exactly followed in this case, and that by the sixty-ninth section of the act it was provided that no objection should be made or advantage taken for want of form in any of the proceedings. That besides it was stated that the road had existed immemorially, and the court may refer the liability of this district to repair, which was expressly stated, to the same period of time before mentioned.

Bevan, in support of the rule, argued that none but the parish at large were bound of common right to the repair of high roads; and therefore if it is attempted to charge smaller districts with that burthen, it must be shewn expressly how they are liable. This point has been expressly decided in this court, in the case of *The King v. The Inhabitants of Linkfield Street in Rygate, Mich.* 26 Geo. 3. That was a presentment in the very same form as the present, charging that the inhabitants of the borough of *Linkfield Street*, in the parish of *Rygate*, in the county of *Surry*, ought to repair and amend the high road when and as often as it should be necessary. After verdict it was moved in arrest of judgment by *Runnington*, that as it was a presentment against a particular district within a parish, it should have stated particularly in what manner they were obliged to repair, whether by custom, usage, prescription, &c. and that the general allegation that they ought to repair was insufficient: and he cited *Sty.* 163. *Andr.* 216. and *5 Burr.* 2700. in which last case it was alleged in the indictment that the district from time whereof &c. ought to repair. *Mingay*, who shewed cause, admitted the principle, but contended that the general highway act 13 Geo. 3. c. 78. which gave authority for the presentment, had sanctified the form in which it was drawn. But *The Court* held the objection good, and the rule was made absolute for arresting

(a) *Vide ante* 260.

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

515

the judgment. As to the objection that this presentment followed the form prescribed; that form only relates to parishes.

1788.

Per Curiam. This presentment is clearly bad; for being an attempt to charge part of a parish only with the repairs of the road, which is against common right, it must be shewn expressly how they were liable. This is an objection to the *substance*, and not merely to the *form*.

The KING
against
The Inhabitants of
PENDERYN

The judgment arrested.

The KING against THOMAS AMERY.

Monday,
June 2d.

The KING against JOHN MONK.

*See vol. 1.
p. 575.*

THE first of these was an information in nature of a *quo warranto* against the defendant for exercising the office of alderman of the city of *Chester*. To which he pleaded letters patent granted by *Car. 2.* on the 4th. *Feb.* in the 37th. year of his reign, by which the citizens and inhabitants of *Chester* were incorporated; and that there should be a mayor, recorder, twenty-four aldermen, forty common councilmen, two sheriffs, and certain other officers. The king by those letters patent appointed the first twenty-four aldermen; and prescribed the mode of electing a mayor, namely, on *Friday* after the feast of *St. Dennis*, yearly, by a majority of the mayor, aldermen, and common councilmen assembled. The plea then stated that that charter was accepted, and agreed to, by the said citizens and inhabitants. And the defendant regularly deduced a title as alderman under it.

A judgment of seizure *quousque, &c.* against a corporation, in default of appearance, operates as a final judgment to dissolve the corporation, if they do not appear in the same term, or the next at furthest. And a new charter of incorporation granted after that time to a new body in the same place is good,

notwithstanding a charter of restitution be afterwards granted to the old corporation: and such charter of restitution is absolutely void.—A power reserved to the crown in a charter of incorporation to amove, by order of council, *one or more* of the corporators, which declared that *all or any of them* so amoved should actually and without further process be amoved, and which also provided at the same time that upon such amotion the remaining corporators might proceed to fill up the vacancies, cannot be exercised to such an extent as not to leave a sufficient number to make a re election; and therefore an amoval of all is illegal and void.

The prosecutor replied that king *Charles* the Second did not grant in manner and form, &c. That those letters patent were not duly accepted by the said citizens and inhabitants. That the defendant was not duly elected an alderman, as in his plea alleged. And that he was not admitted into the office of alderman, &c.

Replication.

And the prosecutor added two new replications. In the first of which he stated that the said late king *Charles* the Second, in the

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1788.

The KING
against
AMERY.

Power of
amotion.

the same letters patent in the said plea of the defendant above mentioned, *further* willed, and by the same letters patent provided and reserved full power and authority to himself, his heirs and successors from time to time and at all times thereafter, *at the free will and pleasure of the said late king Charles the Second*; his heirs, or successors, the mayor, recorder, common clerk, or any one, or more of the aldermen, common councilmen, sheriffs, coroners, and justices of the peace of the said city for the time being, by any order of the said late king, his heirs, or successors, in privy council made, and under the seal of the said privy council to them respectively signified, to amove or declare them or any of them to be amoved accordingly; and that as often as the said late king his heirs or successors, by any such order made in privy council, should declare any such mayor, recorder, common clerk, and every one or more of the aldermen, common councilmen, sheriffs, coroners, or justices of the peace of the said city for the time being, to be amoved from his or their respective offices, that then and from thenceforth the mayor, recorder, common clerk, aldermen, and common councilmen, sheriffs, coroners, and justices of the peace for the time being, and *all or any of them so amoved* or declared to be amoved from their respective offices should in deed, and in fact, and without any further process, actually and to all intents and purposes whatsoever, be amoved from their respective offices; and *so from time to time as often as the case should so happen*; any thing in the said letters patent contained to the contrary notwithstanding: *And that in every such case other fit person or persons, within a convenient time after such amotion or amotions, should be chosen, sworn, and appointed*, in such manner as by the said letters patent was before directed, into the place and office or places and offices respectively of any such person or persons so amoved; as in and by the said letters patent, &c. That, after the making of the said letters patent of the said late king *Charles the Second*, to wit, on the 12th. day of *August* 1688, under and by virtue of the said last mentioned letters patent, *Hugh Starkey*, esq; was one of the aldermen of the same city and a justice of the peace of and within the said city of *Chester* and county of the same city, and that *Richard Leving*, esq; was then and there recorder of the said city, and also one of the aldermen of the said city, and a justice of the peace of and within the said city of *Chester*, and county of the same city, and that the right honourable *William Earl of Derby*,

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

517

Derby, &c. (mentioning them by name) severally were also aldermen, and each of them was an alderman of the said city of *Chester*, (and thus enumerating all the other officers in the corporation;) and that no other persons or person whomsoever then were or was aldermen, or common councilmen, or an alderman, or common councilman, of the said city of *Chester*. That the said last mentioned persons, so being aldermen and common councilmen of the said city, and there being no other person or persons whomsoever, aldermen or common councilmen, or an alderman or common councilman, of the said city of *Chester*, his said late majesty king *James* the second afterwards, to wit, on the 12th day of *August* 1688, by his order in privy council made, in execution of the power reserved to the said late king *Charles* the second, his heirs or successors, in and by the said letters patent, made in the thirty-seventh year of king *Charles* the second, in the defendant's plea mentioned, was pleased to order, and did thereby order, that the said *Hugh Starkey, &c. &c.* (naming them as before) should be, and they were, *thereby removed* and displaced from their aforesaid offices and employments in the said city of *Chester*. The replication then stated that that order was signified to each of them respectively, (naming them) and thereby they, and each of them, severally and respectively, became and were amoved from their respective offices, and places of aldermen, and common councilmen, beforementioned; *wherefore the said power* in the said last mentioned letters patent, *as to the election of aldermen of the said city of Chester, ceased and determined.*

The second replication set forth a charter of incorporation granted by king *Henry* the seventh, in the 21st year of his reign, to the citizens and commonalty of *Chester*; who were to elect, annually, a mayor, recorder, twenty-four aldermen, forty common councilmen, two sheriffs, &c. which letters patent were accepted, &c. It then stated a charter of confirmation in the 16th of *Elizabeth*, which was also accepted. And that both these charters were in full force, strength, and effect, before, and until, and at the time of the judgment herein after next mentioned, &c. The replication then stated that in *Trinity Term*, in the thirty-fifth year of the reign of *Charles* the second, Sir *Robert Sawyer*, knight, then attorney general, filed a certain information in the court of king's bench, against the said mayor and citizens, *by the name of the mayor and citizens of the said city of Chester,*

1788.

The KING
against
AMERY.

Order of
amoval by
king *Jac.* 2.

Wherefore
the power of
electing al-
dermen un-
der charter
Car. 2.
ceased.

2d. Replica-
tion.

2d. warranto
information
35 *Car.* 2.

1788.

The KING
against
AMERY.

Judgment
quo. sive, &c.

by which said information the said attorney general of the said late king gave the said court there to understand, and be informed, that the said mayor and citizens of the said city of *Chester*, by the space of one month then last past, and longer, had used, and did then use, and claimed to have and use, without any warrant, or royal grant, within the said city and the liberties and precincts of the same city, divers liberties, privileges, and franchises, in the said information mentioned, that is to say, *to be in themselves one body corporate* and politic, in law, fact, and name, by the name of the mayor and citizens of the city of *Chester*; and by the same name to plead and be impleaded, answer and be answered unto; and also to have sheriffs of the said city, and the county of the same city, &c. (specifically stating all the privileges claimed;) All and singular which liberties, privileges, and franchises, the said mayor and citizens of the said city for all the time aforesaid against the said lord the late king had usurped, and did then usurp, in contempt of the said lord the late king, &c. and thereupon the said attorney general for the said lord the late king prayed the advice of the court there in the premises, and that due process of law might issue in that behalf against the said mayor and citizens, to answer to the said lord the late king, to shew by what warrant they claimed to have and exercise the liberties, privileges, and franchises, aforesaid, &c. It then stated that such proceedings were thereupon had in the same court, that afterwards, to wit, in the Term of *Saint Hilary*, in the 35th and 36th years of the reign of the said late king *Charles* the second, *for the default of the said mayor and citizens in not appearing in the said court of the said lord the late king, before the king himself, to answer to the said lord the late king, touching and concerning the premises, it was then and there by the same court of the said lord the late king, before the king himself, considered that the liberties, privileges, and franchises, in the said last mentioned information above specified, should be seized into the hands of the said lord the late king, until the said court there further ordered; as by the records and proceedings thereof remaining in the court, &c. appears.* That after the said judgment, and after the making of the said letters patent in the defendant's plea mentioned, to wit, on the 19th day of *October* 1688, his late majesty king *James* the second, by a certain order in council, bearing date the 19th of *October* 1688, being graciously resolved that the city of *Chester* and the mayor and citizens thereof should be restored to their
ancient

ancient charters, rights, and franchises, notwithstanding the judgment and proceedings against them in an information in the nature of a *quo warranto* in the court of King's Bench in the reign of the late King *Charles* the Second, &c. was pleased to order, according to the power to him reserved in the late charters, patents, and grants, and it was thereby ordered accordingly, that all mayors, sheriffs, recorders, aldermen, common councilmen, &c. and all other officers and members of the said city of *Chester*, constituted, named, appointed, or elected, by virtue of any charter, patent, or grant, since the year 1679, from the late king, or his then majesty, and all and every person and persons, having, or claiming, any office or place by the same, be removed, displaced, and discharged; and they and every of them were thereby removed, displaced, and discharged accordingly. And it was further ordered by his said late majesty King *James* the Second, by the said order in council, that Mr. *Attorney*, or Mr. *Solicitor General*, should prepare a bill, instrument, or instruments, for his majesty's royal signature, for the granting, confirming, and restoring, of the said city of *Chester*, and the mayor and citizens thereof, to their ancient charters, rights, franchises, offices, and places, had or used by them before the said judgment given, and proceedings against them, and to pardon, discharge, vacate, annul, and reverse, the said judgment and proceedings. The replication then stated a charter of restoration, dated the 26th of *October* 1688, pursuant to the last-mentioned order in council, whereby the judgment in *quo warranto* was pardoned and released, and their former liberties restored to the mayor and citizens of the old corporation, &c. Which said letters patent the said mayor and citizens of the said city of *Chester* accepted and agreed to; with an averment that the information, and the judgment *quousque*, in the replication, and in the charter of *James* the Second, mentioned, were the same. Wherefore the said letters patent of the said late King *Charles* the Second, by the said *Thomas* above in his said plea mentioned, from and after the granting and acceptance of the said letters patent of the said late King *James* the Second, herein-before mentioned, did cease, determine, and become void, and of no further effect, to wit, &c.

The defendant in his rejoinder stated that the order in council under the privy seal of the said privy council in the replication mentioned, was not signified to the said *Hugh Starkey*, &c. (naming them) in manner and form in the replication alleged, &c.

1788.

The KING
against
AMERY.King *James*
the Second's
order in
council for
restoring the
mayor and
citizens of
Chester.Charter of
restoration in
1688.

Rejoinder.

1788.

The KING
against
AMERY.

Final judg-
ment, Tr.
36 Car. 2.

See infra

&c. on which issue was taken. To the second replication he rejoined that such further proceedings were had upon the said information in that replication mentioned in the said court of the said lord the late King *Charles* the Second, before the king himself, that afterwards, to wit, in *Trinity* Term, in the 36th year of *Car. 2.* it was considered by the said court of the said lord the late king, before the king himself, that the said liberties, privileges, and franchises, in the last-mentioned information specified, *should be seized into the hands of the said lord the king, and the said mayor and citizens be excluded and amoved therefrom;* the record of which said last-mentioned judgment is lost or destroyed, and is not now remaining in the said court of the said lord the now king before the king himself. With an averment that that judgment is still in force, and not reversed; by reason whereof the said community and body corporate of the mayor and citizens of the said city of *Chester* in that replication mentioned became and was totally dissolved and destroyed long before and until and at the time of the supposed granting and acceptance of the said supposed letters patent of the said late King *James* the Second in that replication mentioned, to wit, at, &c.

Surrejoinder, taking issue on the final judgment of *Trinity* Term, 36 *Car. 2.*

Verdict.

On the trial the jury found that King *Charles* the Second granted &c. as in the defendant's plea; and that that charter was accepted by the citizens and inhabitants. That the order of removal of all the officers by King *James* the Second in council was duly signified to them. That the defendant was duly elected, and admitted, under that charter. That the order of privy council of King *James* the Second, dated the 12th of *August* 1688, mentioned in the replication, was signified to the members. And that there was no final judgment of *Trinity* Term 36 *Car. 2.*

The pleadings and verdict on the information against *J. Monk*, for exercising the office of common councilman, were the same as those against *Amery*, *mutatis mutandis*; and the arguments and judgment of the court are equally applicable to both.

Bower obtained a rule in *Easter* Term, 27 *Geo. 3.* to shew cause why the postea should not be delivered to the defendant, in order that he might enter up his judgment on it, and that in the mean time it might remain in the associate's hands.

This matter was argued in *Trinity Term* 1787, by *Adair*, *Serj. Erskine*, *Wood*, *Milles*, *Lane*, and *Topping*, for the crown; and by *Bearcroft*, *Leycester*, *Bower*, *Plumer*, and *Manley*, for the defendants.

1788.

The KING
against
AMERY.

The counsel for the prosecutor made two general points. First, It appears upon the whole of the record that the charter of *Charles* the Second, from which the defendant deduces his title, never had any legal existence. Secondly, But if it had, it was completely done away by the order of amoval in the reign of *James* the Second, or by the charter of restitution, and consequently was not the subsisting charter which regulated the corporation of the city of *Chester* at the time of the defendant's election. Under the first head of argument, it was contended, 1st, That no judgment whatever could be given on the *quo warranto* information, which was filed in the reign of *Charles* the Second; or at least that no judgment of *seizure* could be given on it; if any, it should have been a judgment of *ouster*. Secondly, There cannot be a final judgment against a corporation, as such, before appearance. Thirdly, The judgment *quousque* in *Charles* the Second's reign, not followed up by final judgment, or by seizure, *did not suspend the functions of the corporation*. Fourthly, Supposing there was a suspension, the judgment *quousque* *did not operate as a dissolution of the corporation*, so as to enable the crown to grant another charter; for a corporation cannot be dissolved, either by it's own acts, by the acts of the crown, or by a judgment in a court of law. Fifthly, In point of fact the charter of *Charles* the Second was granted to the old corporation, and not to the citizens and inhabitants as a new description of persons; or in point of law he could not grant it to the citizens. But, sixthly, if he could in point of law, and did in point of fact, grant that charter to a new description of persons, it was void in law on account of the power reserved to the crown of removing all or any of the corporators.

As to the first. It appears upon this record that the *quo warranto* information which was filed in the 35th *Car. 2.* was totally false and unfounded. There are only two sorts of proceeding against a corporation. The first case is when a corporation legally created abuse any of the franchises to which they are entitled, or usurp others to which they have no claim; there the information is brought against *the corporation as such*, and there a judgment of *seizure* is given. But when a body of men assume

The judgment given against the old corporation void.

1788.

The King
against
AMERY.

to themselves to be a corporation by any given name, and the information is brought against them for usurping to be a corporation, it cannot be brought against them by their corporate name, but it must be against them in their *individual names*; because it is in disaffirmance of the corporation; and in such case there must be a judgment of *ouster*. For it would be absurd to say that they have forfeited that which never existed. Sir Robert Sawyer, in arguing the *quo warranto* case against the city of London (a), speaking of judgments against corporations, and of Mortimer's case, says, "What was intended by a judgment of ouster in that book, and in what cases by the course of the king's courts it ought to be, will best appear by an ancient rule taken and agreed by the judges in Edward the Fourth's time (b), before they were promiscuously used. The rule is this, Where it clearly appears to the court that a liberty is usurped by wrong, and upon no title, either by the king's grant or otherwise, judgment only of ouster shall be entered. But where it appears that the king or his ancestors have once granted a liberty, and the liberty is misused, judgment of seizure into the king's hands shall be given. These rules carry their own light with them. That which came out of the king's hands, as *Bracton* useth the word, is properly returned there again by seizure, or, as our ancient books phrase it, by re-seizure. But that which never came thence, but merely usurped upon him, shall be vacated and by judgment of law declared null and void. There is another case which is there likewise resolved, that, where it is doubtful to the court whether the liberty commenced by grant or by wrong, for the uncertainty, the best and safest course is that judgment be given of seizure." He then proceeds to observe that in the case of the bailiffs and aldermen of *New Radnor* (c), which was by default, judgment of seizure was only given. So also in the case of *New Malton* (d). *Pollexfen*, in arguing the city of London case (e), says, "I do agree that there be precedents in the crown office of *quo warrantos* brought against corporations for usurping to be a corporation, and for claiming divers other privileges. But (he observes) that they all being for *claiming other liberties* as well as to be a corporation, and being good and

(a) Page 16. The references to the *London quo warranto* case are made to the arguments of the respective persons.

(b) 15 Ed. 4. 7. b.

(c) M. 20 Jac. Rot. 17.

(d) Tr. 6 Jac. Rot. 3.

(e) Page 68.

"sufficient

“ sufficient as to the other liberties and privileges that the corpo-
 “ ration claims, though insufficient for claiming to be a corpora-
 “ tion, they must be proceeded upon.” Now the information in the
 35 *Car.* 2. is falsified upon the record. That was not an infor-
 mation against *A.* the mayor, *B. C.* and *D.* the aldermen, and
E. F. and *G.* the common councilmen, stating that they had
 usurped or abused any franchise; but it was against the mayor
 and citizens of *Chester*, by their corporate name, stating that
 they had usurped to be a body corporate: but it appears upon this
 record that they were a corporation, and that they had charters
 from the crown which subsisted when the judgment *quousque*
 was given, and of course they did not usurp the franchise of be-
 ing a corporation; for the replication avers that both the char-
 ters of *Henry* the Seventh and of *Elizabeth* were in full force at
 the time of filing that information. Then no judgment of ouster
 could be given against the corporation, because they had a legal
 existence, and a judgment of ouster cannot be given against a
 corporation by its corporate name. *Pollexfen* (a) in the *London*
 case said, “ that if a *quo warranto* be brought to dissolve a cor-
 “ poration, the writ ought to be brought against the particular
 “ persons, for the writ supposeth that it is no corporation;” and
 cites “ 2 *Roll. Rep.* 15. The difference there taken, when the de-
 “ fendants are supposed to be a corporation, otherwise when they
 “ are questioned as inhabitants of a vill, then they ought to ena-
 “ ble themselves, they must shew themselves a corporation, also
 “ proves it.” And then there is a reference to Lord *Hale*’s
 common-place book, which says “ that if a *quo warranto* be
 “ brought for usurping to be a corporation, it should be brought
 “ against particular persons, because it is in disaffirmance of the
 “ corporation, and then judgment of ouster shall be given; but
 “ if it be brought for liberties claimed by a corporation, it must
 “ be brought against the corporation itself.” A corporation
 cannot usurp to be a corporation. If the information allows
 them to be a corporation, they do not usurp the franchise of be-
 ing one, though they may usurp certain privileges. But if the
 corporate existence itself be denied, then the information must
 be against *A. B.* and *C.* for falsely taking upon themselves to be
 a corporation. And when it is brought against the corporation
 itself, no judgment can be given in disaffirmance of the corpo-
 rate capacity. With respect to a judgment against particular

1788.

The KING
 against
 AMERY.

(a) Page 70.

persons,

1788:

The KING
against
AMERY.

persons, though in effect it may operate as a dissolution, yet by a subsequent grant they would be restored to their old rights, and they would not take *de novo* (a). In the case of *The Mayor, &c. of Colchester* against *Seaber* (b), Lord Mansfield held that the corporation was not dissolved by the judgments of ouster against, and subsequent deaths of, the mayor and aldermen &c. though they were without their magistracy; that their former rights remained; and that the old corporation was revived by a new charter. It is true indeed that a doubt was suggested in that case by Lord Mansfield with respect to the operation of a judgment of ouster against the corporation itself; and it was expressly said by *Wilmot*, J. that it might be forfeited. But in answer to that case it is sufficient to observe that Lord Mansfield's dictum was not positive, but rather indicative of a doubt; and that point was not before the court for judgment. And it appears from the ancient authorities that if the information had been brought against the corporation itself, no judgment of ouster could have been given upon it. In *Sir J. Smith's* case, Lord Holt, in delivering the opinion of the court (c), said that a corporation may be dissolved for a breach of trust (which is against the position now contended for): But then he is clearly of opinion that this is not such a case, and that it cannot be done by a judgment of seizure, nor by an information against the corporation itself. So that on these points (which entirely exclude his opinion on the other point from having any operation on the present question) he agreed with the rest of the court that a corporation cannot be dissolved by a judgment of seizure. Neither can a judgment of ouster be given on such an information as was exhibited against the corporation of *Chester* in the 35 Car. 2. He says, "A judgment of seizure cannot be proper in such case; for if it be dissolved, to what purpose should it be seized? Wherever any judgment is given for the king for a liberty which is usurped, it is *quod extinguatur*; but the *quo warranto* must be brought against particular persons. But where it is for a liberty claimed by a corporation, there it must be brought against the body politic; in which case there may be a seizure of the liberties, which will not warrant either the seizure or dissolving of the corporation itself." That case proves also that the corporate capacity cannot be suspended (d); that even the corporate officers existed; and that the defendant, who was an alderman

(a) *Vide post.*

(b) 3 Burr. 1866.

(c) 4 Mod. 58.

(d) *Vide post.*

1788.

The KING
against
AMERY.

at the time of the judgment, still continued to be an alderman. The same case is likewise reported in *Skin.* 310. and *Show.* 274; in the former of which it appears that the opinion of the three judges, on the collateral point, was against that of *Holt*, and that all of them agreed on the abstract question. In *Skin.* there is this remarkable passage, after stating *Holt's* opinion, "that a corporation may be dissolved," "and such was his opinion in *domo parium*, where ten judges were *à contra*." This alludes to the opinion of the judges, which was taken on the 22d of *January* 1689, on a bill then depending in parliament. Therefore even if there had been final judgment on the information filed in 35 *Car.* 2. it would have been reversed by writ of error, the proceeding being against the whole corporation, as such, for usurping to be a corporation, as was done in the *Malmbsbury* case, 2 *W. & M.* That case was precisely similar to the present, the objection being that there could be no judgment of seizure against the whole corporation in its corporate capacity for usurping to be a corporation: the seizure in such case is an absurdity, because it is seizing that which never had any existence. When the Solicitor-General, in arguing the *London* case (a), is stating a judgment of ouster of particular franchises, which may be done, he admits that there is no case of a judgment of ouster against a whole corporation. As to the case in *Edward* the First's time (there mentioned) it appears that the judgment was given by parliament; and there it was "that the liberty should be forfeited," not that it should be seized into the king's hands only. And the Solicitor-General said, "Indeed I do not find any judgment in a *quo warranto* of a corporation being forfeited." This shews that even at that time the industry of the crown lawyers could not find any such instance. Now it is a strong presumptive argument, and has always been allowed to have considerable weight, that that which never has been done, though the occasion may frequently happen, cannot by law be done at all. And this argument peculiarly applies to those cases where the prerogative of the crown is concerned, more especially in arbitrary times.

Secondly, There cannot be a final judgment against a corporation, as such, before appearance. It is to be observed that this was an *information* in nature of a *quo warranto*, and not a *quo warranto writ*, against the corporation in the reign of *Charles* the Second. The process of these is distinct and different.

No final
judgment
against a
corporation
before ap-
pearance.

(a) Page 14.

1788.

The KING
against
AMERY.

The process in an information is by venire and distringas (a): but in the writ of *quo warranto*, it is by summons; and for default of appearance the liberties shall be seized. *The King v. The Trinity House*, 1 Sid. 86. And in that case where judgment was given against the defendants, (not on the merits, but for a defect in pleading), it was not final, which, it was said, it would have been if the defendants had been sued by a writ of *quo warranto*. But even in a writ of *quo warranto* nothing can be recovered before appearance. 1 Show. 276. Ryl. Plac. Parl. 168. Skin. 293, 310. Jenk. 141. Bro. tit. Judgment, pl. 44. 1 Lev. 105. 2 Saund. 46. and Lutw. 860. For on writs of *quo warranto* which are original writs, the process is the same as on all original writs, by summons; and if the defendant does not appear at the return of the summons, a grand cape issues. Braet. 371-2. And if land were taken under a writ of grand cape, it was clearly repleviable within a certain time: but if he did not come in and replevy, he lost the possession, but he did not lose his seisin of the land; for he might recover that again. Keilw. 117. It appears from all the authorities upon this subject that judgment *quousque* has only been considered as process to compel an appearance; and that till appearance final judgment cannot be given. In 10 Mod. 230. Eyre said "In informations no judgment can be given unless the defendant appears: the defendant may indeed have judgment of outlawry passed against him: but that is for his contempt in not appearing." Judgment of outlawry is only process to bring the party into court. But corporations cannot be outlawed; the process against them must be by distringas. Bro. tit. Corporations, pl. 11. 45 E. 3. 2. 3. Skin. 85. In the *London* case, Sir R. Sawyer (b) said "Where seizure is by award of the court for a contempt in court, the court may admit the parties to affix and order restitution; so where by award of the court on default of appearance at the king's suit a seizure is made, which is in nature of a distress to bring in the party by putting him out of the possession of the liberty till he appear and replevy. The court, if the defendants come in time, and pray it, may deliver them the possession upon replevin; and this by the statute *de quo warranto*. 30 Ed. 1." Nothing is there said of a restitution after judgment, but only after a seizure. Now there cannot be a replevy till seizure. Sir G. Treby, in arguing the *London* case (c), after taking notice of the rule laid down in 2 E. 3. 28 & 29.

(a) 1 Sid. 86. Salk. 374. 1 Lord Raym. 426.

(b) P. 16.

(c) P. 13.

"that

“that in some cases a franchise ought to be taken into the king’s hands, in some cases it ought to be seized till a fine be made to the king, and in some cases it ought to be forejudged,” observes “that it answers all the arguments produced about seizures, either by act of parliament, or for a fine, or for a distress for want of an appearance. If it be a real action, there goes out a grand cape, and there the lands shall be seized into the king’s hands, and that looks big upon record: but if you come to know the meaning of it, it is only that the sheriff should re- turn issues upon it”. In *Jenk.* 141, 2. it is said “On *quo warranto*, if the defendant makes default after being summoned, and another default at the return of the *venire facias*, judgment shall be that the franchise shall be seized into the king’s hands; and not that it shall be forfeited. For no man shall lose his land, or his franchise, upon any default, if he has never appeared.” In real actions where a tenant makes default, the summons goes to the tenant to answer his default, and to come in and answer the plaint which is the principal cause of the action; but the court cannot give any judgment upon it till an answer be put in. In *The King v. The Mayor and Aldermen of London*, *Holt*, Ch. J. said “(a) I do not think a judgment for seizure, where it is a final judgment, to be ineffectual: and the judgment of seizure *quousque* &c. in case of non-appearance proves it.” So that he considered that a final judgment would be useless, if a judgment *quousque* operated as a final judgment. In 2 *Rol. Rep.* 92. and 3 *Burr.* 1532. it is said there can be no judgment before appearance.

Thirdly, the judgment *quousque* in *Charles* the Second’s reign, not followed up by a final judgment, or by seizure, did not suspend the functions of the corporation. The difference between the effect of a judgment *quousque* and a final judgment appears from the forms of the different judgments. The former is, “that the liberties &c. shall be seized till the court shall further order”; the latter that they shall be seized into the king’s hands. *Ryl. Plac. Parl.* 6. 188. 277. So that after the judgment *quousque* in this case, the liberties and franchises of the corporation were at the disposal of the court; and as no order was made by them, the king could not grant them to another description of persons till final judgment. If on a judgment *quousque* the king had the power of disposing of the franchises, &c. by granting them immediately, he might deprive the original possessors of an op-

1788.

The KING.
against
AMERY.

Judgment
quousque did
not suspend
the functions
of the corpo-
ration.

(a) 1 *Shew.* 280. *Skin.* 310.

1788.

The KING
against
AMERY.

portunity of curing their default, which they could otherwise do by appearing. It does not appear on this record that the judgment was carried into execution; but the contrary rather appears. For, even supposing the information to have been legal, yet *non constat* that the corporation did not appear after the judgment *quousque*. As it does not appear on this record that there was an actual seizure on the judgment *quousque*, there was no laches in the corporation in not replevying, or not appearing; and as the crown did not follow up the interlocutory judgment by a final one, the suit was abandoned. It should have been averred that the judgment itself did suspend the functions of the corporation; and as it is not so averred, it cannot be presumed. It does not appear in this case that any writ of seizure ever issued in fact. Lord Coke, in commenting upon that clause of the statute *Westm. 1.* which gives authority to the crown to seize markets, &c. for taking outrageous tolls, &c. till they be redeemed by the owners, observes that it must only be intended to be seized *on an office found* (a). So that though that act of parliament gave the crown an express power of seizing the franchise, yet Lord Coke was of opinion that it means, not a forfeiture absolutely, but only till it be redeemed; and that even the seizure itself shall not operate till some act be done to put the crown in possession of the seizure, namely, "till office found." On the present record no writ of seizure is stated; therefore the crown never had the possession of the franchise. It is no answer to the want of a writ of seizure to say that it is an incorporeal hereditament; because in such cases writs have actually issued; which shews that an incorporeal hereditament is as capable of being the subject of a writ of seizure as of a writ of restitution. It is the uniform practice to issue these writs; and they were in fact sued out in the cases of *The King v. St. Ives* (b); *The King v. Langbour* (c); *The King v. Thaxted* (d); *The King v. The Burgesses of Calne* (e); and there are several other instances cited by Sir R. Sawyer (f). And in the case of *The King v. The Mayor, &c. of York* (g), where there was a judgment *quousque*, a writ of seizure must have issued; because there was a writ of restitution. In the present case a writ of restitution could not be necessary; there could be no writ to restore that

(a) 2 *Inst.* 222.(b) *H. 36 Car. 2. Rot.* 49.(c) *M. 36 Car. 2. Rot.* 218.(d) *T. 36 Car. 2. Rot.* 149.(e) *H. 35 & 36 Car. 2. Rot.* 50.(f) *P.* 29, 30.(g) *E. 36 Car. 2.*(b) 4 *Jac. 2.*

which

which was never taken. Neither could the corporation have replevied, because there was no seizure. "A judgment ought to be complete; therefore if *quo warranto* be brought for usurping royal franchises, the court give their opinion that the defendant hath no title to them; unless they proceed and say, *ut abinde excludatur*, it avails nothing (a)." And as this judgment was not followed up by a final judgment, no writ of error lies; for a writ of error does not lie to reverse an interlocutory judgment. It is said in 9 Co. 96. If the king's title to incorporeal hereditaments be found by office he shall be in possession before seizure: but till office found he could not grant. Sav. 70. So here till final judgment he could not grant. In all cases whatever where there is a transfer of an incorporeal hereditament, there is a writ to give possession (b). The reversal of the *Malmesbury* case shews it; that was a judgment for non-appearance.

Fourthly, But even supposing that the judgment *quousque* is in itself a seizure, and that no writ of execution is necessary, the franchise being an incorporeal hereditament, and that the award of the court is in itself an execution so as to render it necessary for the party to come in and replevy in order to protect himself against final judgment, yet as in this case the crown did not take advantage of it, by obtaining final judgment, the corporation itself was not dissolved, though its liberties may have been suspended. If so the crown could not legally grant a new charter to the citizens and inhabitants of the same place, there existing in contemplation of law, at the time of such grant, another corporation. For if it be true that a judgment *quousque* without replevy is equivalent to final judgment, and that the king may grant the same franchises to a new body of persons, it never could be necessary to proceed to final judgment. And if the crown were to grant a new charter the day after the interlocutory judgment without waiting for a final judgment, the old corporation would be precluded from entering an appearance; or if they might afterwards appear, the new corporation would be a contingent corporation, depending on the event of the judgment against the first. Then what time is limited for the old corporation to enter an appearance? It appears in this case that the charter of *Charles* the Second was granted within a year; therefore the court must at least say that the corporation could

1788.

The KING
again?
AMERY.

The judgment *quousque* did not dissolve the corporation.

(a) 1 Lord Raym. 17.

(b) *Stamf. Prerog. Reg.* 77. b.

1788.

The KING
against
AMERY.

not replevy after a year. But in the *quo warranto* information against the corporation of York (a), a judgment of seizure was given for want of an appearance; but afterwards they entered an appearance in Mich. 4 Jac. 2. The proceedings there state that the liberties were seized into the king's hands for want of an appearance, and they prayed that the king's hands might be amoved, which, together with the restoration of their liberties, was ordered by the court, and then leave to imparle was granted. Now if the liberties had been absolutely vested in the king by the judgment *quousque*, the court could not have exercised such an authority. Afterwards the judgment was released, and a *noli prosequi* was entered by the Attorney General. But during the intermediate time no change appears to have been worked in the corporation; they still continued the same. So that in the York case, the corporation were permitted to appear several years after the judgment *quousque*: but in the Chester case, if the charter of Charles the Second, granting the franchises &c. to a new body, were conclusive against the old corporation, they were deprived of an opportunity of appearing within a year. If that charter were not conclusive, it was either void *ab initio*, or voidable, depending on the contingency of the old corporation being revived. It could not be valid as a perpetual grant, because the king could not derogate from his former grant, while the old corporation was in existence: and if it were only to take effect during the suspension of the old corporation, then the charter of restitution, which vivified the old corporation, extinguished the new one. (*Vide post.*) From this it is clear therefore that a judgment *quousque* does not occasion a forfeiture; but the liberties are only kept by the court as a means of compelling the corporation to appear and answer the charge. This is not like the case of an attainted person, where it is said that the king cannot grant to him all his former rights; because there the person attainted is absolutely dead in law; but here the liberties were only *suspended*; they were not *annihilated*. Thus it stands upon the judgment *quousque*: but even if it had been followed up by a final judgment, that would not have worked a *dissolution* of the corporation. For it appears from all the authorities that a corporation, once duly and legally existing, cannot be dissolved either by their own acts, the acts of the crown, or by any judgment in a court of law; if by the word

(a) E. 36 Car. 2.

"dissolved"

"dissolved" be meant an entire destruction and annihilation of the corporation in its corporate capacity. 1st. A corporation cannot annihilate itself; it cannot surrender up its corporate capacity and existence. The first authority is the case of the Dean and Chapter of *Norwich* (a): there the surrender was in very general terms; for though the terms used in the report in *Coke* only imply a surrender of the church and of the possessions &c. yet it was a surrender of all their rights, privileges, &c. which they held in right of their corporation, as appears from 2 *And.* And it was there held that the old corporation of dean and chapter did remain, notwithstanding the surrender (b). And in the case of *Hayward v. Fulcher* (c), subsequent to this surrender, it is stated that king *Ed. 6.* granted a new charter of incorporation by the old name, with additional words. On arguing the special verdict in that case it became a material question which of those corporations subsisted; the court unanimously held that the old corporation still subsisted, and that the new charter of incorporation was void. This question of a surrender of a corporation occurred again in a later case, in *The King v. Grey* (d): there the chief question was, whether by a surrender of the corporation of *Colchester* in the reign of *Charles* the Second, the corporation itself was dissolved; for if it were, the charter of king *William*, by which lands and privileges were re-granted, was void, because it was to a corporation not in being. There indeed the question was considered *reverso intuitu* from the last. That was whether a charter granted to the old corporation was good or not, which question depended on the same preliminary question, namely, whether the first corporation was dissolved: and three judges were of opinion that it was not; that the corporation was still subsisting, and had a capacity to take. And they said that in the case of the city of *London*, it was the opinion of several learned men that a corporation could not surrender its corporate existence. This likewise appears by the surrenders of abbies in the reign of *Hen. 8.* for it was thought that it was not sufficient to rest entirely on their surrenders, but it was deemed expedient to obtain an act of parliament to effect what they could not of themselves do. This is also confirmed by *Treby's* argument (e) in the *London* case, where he observes that it was

1788.

The KING
against
AMERY.

A corporation cannot
surrender its
corporate
existence.

(a) 3 Co. 73. 2 And. 165.

(b) 3 Co. 76. b.

(c) Palm. 491. Sir W. J. 166.

(d) 8 Mod. 358.

(e) P. 10.

thought

1788.

The KING
against
AMERY.

The king
cannot by his
prerogative
destroy a cor-
poration.

A corpora-
tion cannot
be dissolved
by a judg-
ment in a
court of law.

thought necessary expressly to enact by 32 H. 8. c. 24. that the corporation of *St. John at Jerusalem* should be dissolved, for that the surrender of their lands, and the vesting of them in the king, were insufficient for that purpose. There are only two cases to be found, in which it is said that a corporation may lose its corporate capacity by its own act. The first is the Dean of *Wells's* case. *Dy.* 273. where it is said that corporations have been dissolved by surrenders: but it is said in *Palm.* 495. that where they speak of dissolutions by surrenders, it is a relation of fact only, and not of law. The other case is in *Dyer* 282: but a very full answer is given to that case by *Treby* (a) in the *London* case. First, he said, that the reason digressed from the main point, as was observed in *Palm.* 502. 2dly, It was a private extrajudicial opinion given by only five of the judges; so that the other seven might have been of a different opinion. 3dly, The case was mistaken; for the surrender could not be good without the consent of the bishop. 4thly, The surrender was by act of parliament, as was said by Lord *Coke* in 1 *Leon.* 234. And 5thly, It is not in the original manuscript of *Dyer's Reports*. Secondly, The king cannot by his prerogative destroy or dissolve a corporation. This is expressly laid down in *Palm.* 501. *Bro. tit. Corporation, pl.* 78. The king cannot only not dissolve a corporation; but he cannot take away any of the privileges of a corporation which have been formerly enjoyed. 3 *Burr.* 1656. Thirdly, A corporation cannot be dissolved or annihilated by a judgment in a court of law. Though a difference of opinion is to be met with in the books on this subject, yet when the affirmative of this proposition is to be found, it always appears to be against the opinion of the majority of the judges; and it has never yet been confirmed by any judicial decision. There is no instance of a judgment of ouster against a whole corporation (b). That a judgment in a court of law does not extinguish corporations aggregate appears by the analogy which they bear to corporations sole. Sir *R. Sawyer* (c) says, that "single bodies politic have conditions annexed to them
" upon the trust of their creation, the breach of which is in law
" good cause of separating the politic person from the natural,
" by deprivation, which in the civil law is of the same effect
" as judgment of ouster by the common law; and their suspen-
" sion hath some resemblance to our seizures into the king's

(a) *P.* 11.(b) See the argument and cases cited, *ante*, 525.(c) *P.* 21.

"hands,"

"hands." Therefore, as in corporations sole, suspension merely dissolves the connection between the natural and politic body, but does not affect the corporate capacity; so in aggregate corporations, though judgment of ouster be given against particular, or even all the, members of a corporation, by which the natural body is separated from the body corporate, yet the franchise itself still remains. What is said in 4 *Inst.* 228. goes still farther, and shews that even the privileges &c. of a corporation cannot be seized, as forfeited, by the king. That was the *Cambridge* case, and that corporation had certainly been guilty of such an offence as would have induced a forfeiture in a court of law, if it could have been effected: but it appears there that the king by *common consent of the parliament, and by authority of the same*, seized the liberties into his hands as forfeited; and Lord Coke has added in the margin, "*Nota, by act of parliament.*" Now if he could have seized them as forfeited, without the authority of parliament, he would not have had recourse to them for it. That the doctrine contended for obtains in point of law appears not only from the books of law and ancient records, but it appears also that, in point of fact, corporations, after judgment of seizure into the king's hands, have continued to enjoy that capacity; for after taking re-grants, they have been held to be in of their former title. Innumerable instances of this kind are to be met with (a). These arguments and authorities go to shew, that, even if there had been a final judgment on the *quo warranto* information filed in *Charles* the Second's reign, the corporation itself would not have been dissolved, but it would have been revived by the charter of restitution: but it is sufficient, in the present case, to say that there was no final judgment, and that the liberties of the corporation of *Chester* remained in the power of the court by the judgment *quousque*; and as they were not absolutely vested in the king's hands, he could not grant them to another body of persons. The circumstance of Sir *Robert Sawyer's* having prayed final judgment of exclusion is a strong proof that he was of opinion that the judgment *quousque* was not conclusive. It is clear also that the defendant in this case thought that a final judgment was essential to the support of his title, for he has stated it in his rejoinder: and by the rejoinder he admits that the corporation was not dissolved by the judg-

1788.

The King
against
AMERY.

(a) *Post.*

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1788.

The KING
against
AMERY.

5th, The
charter of
Car. 2. was
granted to
the old cor-
poration.

ment *quousque*, but by the final judgment; and that issue is found against him.

Fifthly. Either in point of fact the charter of *Car. 2.* was granted to the old corporation, and not to the citizens and inhabitants as a new description of persons; or in point of law he could not grant it to the citizens. That the charter was granted to the old corporation is clear for many reasons; 1st, It gives the same name of incorporation with the prior charters; 2dly, There was an exception of certain persons in the charter, who were members of the old corporation, which would not have been necessary, if the new charter had been directed to a different set of men; 3dly, From the gross absurdity of supposing that the king would grant to two different bodies the same jurisdiction and privileges in the same place at the same time; 4thly, The supposition of their being the same body will account for the king not proceeding to final judgment; because, as the old corporation had accepted his new charter, his purpose was answered, and the corporation always remained. There is also a strong reason why the court should encline in favour of this opinion, because by these means only the ancient prescriptions may be preserved; for there can be no privity between two distinct corporations, existing under different acts of creation. *Pollexfen's Argument*, 105. and 113.—1 *Inst.* 102. b.—and 2 *Lord Raymond*, 1239. But if it were granted to the same body, those old rights would still continue; and the charter of *Car. 2.* will merely operate as a charter of alteration and addition, and not as a charter of creation. 3 *Burr.* 1870. *Sir T. Raym.* 439. Now if the charter of *Car. 2.* were granted to the same body, it is immaterial whether the charter of *Jac. 2.* operated as a new grant, or as a release of the judgment *quousque*, and a restoration of the old franchises; for in either case the charter of *Charles the Second* is done away by the acceptance of a subsequent inconsistent charter; and the charter of *James the Second*, whether by relation, or as a new grant, became and has continued the governing charter of the place. But even supposing that the charter of *Car. 2.* was in fact granted to the citizens and inhabitants of *Chester* as such, what is the legal effect of it, when granted to the inhabitants of a city where there was at that time a subsisting corporation under prior charters, neither of which was affected by the judgment *quousque*? The acceptance of such a charter in point of fact cannot go beyond the legal operation of

Charter of
Car. 2. if
granted to a
new corpora-
tion, was
void.

of the charter itself which was accepted. In the case of *Hayward v. Fulcher* it was held not only that a corporation cannot surrender its corporate existence, but also that a charter granted to a description of persons in a place where an old corporation then subsisted, and granted as a new charter, and not as a confirmation of the old one, was void. In the present case a corporation subsisted in *Chester* at the time of granting the charter by *Car. 2.*; not a guild or fraternity for a particular purpose, but a general corporation for the government of the city; they were the grantees of the city itself; the governors of the city of *Chester*. If therefore the charter was granted by *Charles* the Second to a new body, under an idea that at that time there was no existing corporation in *Chester*, it is void because the old corporation was then in existence. And this shews that the manner in which the Lord Chief Baron, who first tried the cause, considered the question, was the true one, when he left it to the jury to consider (a) whether the charter was directed to and accepted by the old corporation; for at that time there were no other persons in *Chester* capable of accepting it. Whenever a new charter is granted under this kind of mistake, the charter itself and the acts of the parties under it are void. And even if some of the old members had afterwards mixed with the new body in its proceedings, such proceedings would be void. In *Butler v. Palmer, Salk. 191.* where there were two charters, the first of which had been surrendered, which surrender was held void for want of an enrolment; the court said, "As to the new charter, and bye-laws made under it, if those who were members under the old charter happened to be the only persons who acted, they should be deemed to act by virtue of their ancient and true right; but if commixed with others, who were only members under the new charter, though the old members were the majority, yet they must be taken to act by virtue of the new charter, and then what they did was void (b)." On this head it will be incumbent on the defendant's counsel to contend that there may be two corporations in *Chester* existing at the same time, and that the defendant may be an alderman of one only, and not a member of the other. But in answer to that, and to shew the absurdity of such a proposition, it will be sufficient to define the nature of a corporation. A corporation is in its nature different from a guild or

1788.

The KING
against
AMERY.

(a) *Ante*, 1 vol. 579. (b) Vide the case of *The Corporation of Bewdley*, 1 P. Wms. 207.

fraternity.

1788.

The KING
against
AMERY.

fraternity. The true distinction between them is laid down in *Cuddon v. Eastwick* (a), where it was held that a corporation could make a guild or fraternity, but not a corporation. "A corporation is properly an investing the people of the place with the local government thereof, and therefore their law shall bind strangers; but a fraternity is some people of a place united together, in respect of a mystery and business, into a company, and their laws and ordinances cannot bind strangers; for they have not a local power or government." Now in the present case both these corporations upon this record are of the former kind; they are grantees of the government of the city, with the power of making bye-laws, and electing magistrates to govern the city. But two corporations with co-equal powers and privileges cannot exist at one and the same time in one and the same place. It is not contended that the king cannot grant a charter by way of a confirmation of a former one, in order to give the old corporation new privileges; but he cannot grant a new charter to a new corporation in the same place where there is one in existence under a prior charter. Again, if the charter of *Charles* the Second be considered only as a confirmation of the former ones, and granted to the old body, it is equally void. For the crown has no power to dissolve a corporation, or to take away any of their rights and privileges. And here the crown, by its own authority, and without any judgment in a court of law, does by the charter of 37 *Car. 2.* disfranchise seven persons under the colour of a new charter; and if the king can disfranchise seven, he may equally disfranchise all the members. The jury could not possibly say that those seven persons accepted the charter, for they were expressly excluded in the grant. Therefore, even if the words "citizens and inhabitants," to which body of persons the charter of *Charles* the Second is directed, were construed to mean such citizens and inhabitants as by law could accept, yet even they could not accept without the concurrence of those seven persons, whose consent is excluded by the terms of the grant, because that would operate as a disfranchisement of those persons, without any crime alleged, or judgment of law, against them. And notwithstanding the finding of the jury that the charter of *Car. 2.* was in fact accepted by the citizens and inhabitants, they could not accept in point of law, because there was another corporation existing at that time

(a) *Salk.* 193.

IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

537

in the city of *Chester*; neither could it be accepted by the old corporation, because it excepted seven persons in it; so that either way it is void. If so, there is an end of the whole question; because, even if the jury had found all the issues for the defendant, he could not have had judgment upon this record; for the title set up by him is substantially defective, as he claims under a charter which by law could not be accepted.

1788.

The KING
against
AMERY.

But, sixthly, admitting that King *Charles* the Second could in point of law, and did in point of fact, grant the charter to the citizens and inhabitants of *Chester*, as a new body of persons, it was void in law on account of the power reserved to the crown of removing any or all of the corporators. If this clause be illegal, it must be presumed that the king was deceived in his grant from the circumstance of having done that which is illegal, in which case the grant itself is void. For if the king's grant contain an illegal condition, the whole is void; though in the case of a subject the condition only is so, 2 *Rol. Abr.* 164. 2 *Inst.* 533. 1 *Co.* 43. b. 5 *Co.* 55. b. 9 *H.* 6. 28. 2 *And.* 155, 6. 2 *Freem.* 17. 1 *H.* 7. case 26. *Hob.* 223. The principle on which the distinction was made is this; the king has nothing of his own; he holds his prerogatives in trust for the public; and therefore he cannot grant to their prejudice. If the king's grant cannot take effect as he intended, it shall be void, *And.* 155. *Littleton* (a) says "If a man give lands and tenements to another and his heirs male, the grantee takes a fee, because it is not limited out of what body the heirs shall be;" and Lord *Coke*, commenting upon that section, observes (b) "but such a grant from the king is void; for if there can be no such estate as the king intended to grant, it shall be intended that the king was deceived." If therefore the charter of *Car. 2.* be void, the crown is entitled to judgment on the issue of *non concessit*; because if it could not be granted in law, it cannot be considered to have been accepted in fact; and if void in itself no *scire facias* was necessary to repeal it. This power is illegal because it enabled the king to destroy the whole corporation by an order made in privy council without alleging any charge against the corporators. In order to judge of the extent of this power, it is material to consider what the king intended by it, and what power he has in terms reserved. The intent may appear by the words of the charter, which are to be taken

Sixth, The charter of *Car. 2.* was void on account of the power reserved to the crown of removing all or any of the members.

(a) *Sec.* 31.

(b) *Co. Lit.* 27. a.

1788.

The KING
against
AMERY.

most strongly in favor of the king, and by what he actually did in consequence of that reservation. In express words he reserved a power of removing "one or more"; which latter word, being indefinite, may extend to all. And though the king might remove all the members, yet as it might not be necessary to exert that power at all times, it was thought expedient to insert a power of electing others in case only one, or a particular number, of the members should be removed. But it does not follow, (because, if one or more, or any member, short of the whole body, were removed, the rest of the corporation might elect others in their room) that the king has not reserved to himself the power of removing the whole body, under these words. The provision for the supply of members extended to every case, except the amoval of all; and that extreme case could only be remedied by the king himself, by a fresh grant, or by restoring the old members. So that there could be no failure; for where the provision stopped, the king's prerogative began. It cannot be argued on the other side that the power is only reserved to such an extent as enabled the king to remove any of the corporation, taking care to leave a sufficient number to supply their places, because that would be to affix a limitation on the grant of the crown by implication, which could not be made even in the case of a grant by a subject; and much less can it be made in the case of a grant by the crown, where the words are to be taken most strongly in favor of the crown. The king under this power might undoubtedly remove the mayor, the sheriffs, one or more aldermen, and one or more common councilmen: then where is the line to be drawn? for even supposing that he could not remove the whole corporation by the same order, the removal of the whole might certainly be effected by separate orders against each of the individuals. And if the crown had issued as many orders on the same day as there were persons in the corporation, which of those orders would have been valid, and which void? The same reason, which would have supported one, would equally extend to all. But in fact the subsequent words expressly extend to all; "and *all* or any " of them so amoved, &c"; and these refer to each individual member before enumerated. And the power of electing "other " fit persons" in the room of those removed cannot restrain the general power of amotion; because those words are only applicable to the case of a partial amotion, as well as these

1788.

The KING
against
AMERY.

“from time to time” are. And if this power were not exercised to the fullest extent, yet by removing all the aldermen but one, which indisputably might have been effected, the power of electing others would have been destroyed, because the mayor and common council could not by themselves elect; so if all the common council men were removed, the same consequence would have followed. If there were any doubt in the words, the intention of the grant of *Car. 2.* appears from the exercise of the power reserved; for the king did in consequence of this power remove all the members. And that this was his intention, and was so understood by the grantees themselves, is still farther manifested by their submission. But even supposing that the king did not reserve to himself a power of removing the *whole* corporation, such a power confined to a few or even to one would equally avoid the grant; the reservation is unconstitutional in its nature, and in the mode in which the exercise is reserved. 1st, The king cannot remove from a freehold without cause, or legal process in his courts. 2dly, He cannot reserve to himself that power by charter, where according to the common law and established principles of the constitution such office would be a freehold of course, were it not for such power reserved. 3dly, He cannot delegate this power, even if he possesses it himself, to the members of a corporation, or to any other person. 4thly, He cannot exercise it under the great seal, or by order of the privy council. As to the first: it has always been recognized to be the law of the land, from the period when our liberties were first recognized by *magna charta*; and particularly so, as applicable to franchises and liberties, which, it being in the option of the king to create or not, the law always considers, when created, as raised for the benefit of the public; and it annexes to them such a degree of permanency as will best answer the public purpose. Lord Coke in his Comment upon these words of the statute of Gloucester (a), “*Et si forte ex-*”
“*ceperint quod non tenentur sine brevi originali respondere,*” says (b) “here is an ancient maxim in the law implied, that regularly”
“no man ought to answer for his freehold, franchises, or other”
“thing, without original writ *secundum legem terræ*; and that the”
“statutes (c), to that end provided, are but declarations of the”
“ancient common law, as here it is to be seen in case of franchises

(a) 6 Ed. 1. c. 1.

(b) 2 Inst. 282.

(c) Mag. Char. c. 29. 25 Ed. 3. c. 4.
H. 5. 28 Ed. 3. c. 3. and 42 Ed. 3. c. 3.

“in

1788.
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 The KING  
 against  
 AMERY.

“in the king’s own case.” To the same effect are *Dav. 75. a. Plowd. 236. 2 Inst. 36.* And it is admitted by Sir R. *Sawyer (a)* that the king cannot seize without cause; and the cause must be some fact done in breach of the condition in law annexed to the liberty or franchise. So are *2 Inst. 282. 49 E. 3. c. 49. Owen 90. 6 E. 3. 5. Stamf. Prærog. 74.* 2dly, If the king cannot without cause, or without legal process from some of his courts, remove from a freehold or a franchise by virtue of his prerogative, neither can he by his charter or grant reserve to himself such a power over that, which, as a franchise or liberty, is considered by the law and the constitution as a freehold vested in the possessor of it, and would from its nature be so, but for this power reserved. In fact such a power has never been reserved in any other charter either prior or subsequent to it. It is a clear principle of law, that the king’s charter cannot alter the law of the land. *Bro. Abr. tit. Patent 100.* The king cannot make a felony by statute enquirable in a leet by his grant. He cannot grant a leet to be of any other nature than it is at common law. The charter does not augment the prerogative; it flows from it; and therefore it can only give what the common law enabled the prerogative to bestow. The king cannot by his prerogative alter the course of descent of lands. *49 E. 3. 4. 49. Owen 90.* And in *2 And. 156.* it was held that an attempt to grant a new fashioned estate, not warranted by law, was void. In *Norris v. Stapps (b)*, the power of making bye laws is included by law in the very act of incorporating: but these laws must ever be subject to the general law of the realm, as subordinate to it. And if the king in his letters patent of incorporation make ordinances himself, they also are subject to the same rule of law. Now this charter was granted by *Charles the Second*, for the purpose of incorporating certain persons for the general government of the city, the administration of justice, and the preservation of the public peace. Upon the mere creation of such a corporation it appears from the best authorities that rights of a permanent nature, such as that of perpetual succession, are incident to them by law, and attach upon the very being of such a body. *1 Inst. 250.* The rights of the corporation generally become franchises vested in individuals, with which the king cannot interfere by his prerogative. Every member of a corporation hath a freehold therein, and all together have an in-

(a) *P. 15.*

(b) *Hob. 211.*

heritance,



IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

541

1788.

The KING  
against  
AMERY.

heritance, which may go in succession. *Bagg's case*, 11 Co. 98. b. Aldermen and freemen have a freehold in their franchises, *Warren's case*, Cro. Jac. 540. *Bract. l. 2. c. 24. p. 56.* If this be so, the consent of the grantees in this case will not alter the law. For the law will not suffer that to be done by indirect means, which cannot be done directly. A corporation is a public trust, and the rights incident to them are for the benefit of the public. The franchises are not given to the individual for his private benefit, but to enable him the better to execute his trust. And according to *Bagg's case* (a) if a freeman intends or endeavours of himself, or conspires with others, to do any thing against the duty or trust of his freedom, and to the prejudice of the public good of the city, and doth it not, he may be punished for the conspiracy, but not disfranchised. A corporation is like every other public person in this instance, who holds any public privilege as a trust. The king could not grant a bishoprick for a less term than for life, although the grantee might consent to receive it on such terms. Neither could he grant a peerage at will. And the reason given in *Bagg's case*, why a corporation cannot have the power of disfranchising without cause, is, because it would be an injury to the public, as well as a wrong to the individual. It would be as much a wrong for the individual to be amoved without cause by the king, as by the corporation. It is the effect of the power which works the wrong, and not the hand which administers it. 3dly, The king cannot delegate this power to any men, or body of men, to amove *without cause*. He cannot delegate it to the governing part of the same corporation. *Bagg's case*, 11 Co. 98. *Warren's case*, Cro. Jac. 540. A corporation can only disfranchise by the express words of the charter, or by prescription, or after conviction at common law: but the power by charter or prescription must be *for a reasonable cause*. The king cannot prescribe to amove an alderman or freeman without cause. *Warren's case*, Cro. Jac. If the king cannot exercise this himself, or delegate it to the governing part of the corporation, upon what principle can he delegate it to his privy council? 4thly, In this instance the power is to be exercised by an order of privy council. It is not a simple act of prerogative when the order is made in council. It is the great seal which gives authenticity to the grants and patents of the king, 2 *Rel. Abr.* 212. It might also become a serious question whe-

(a) 11 Co. 98.



1788.

The KING  
against  
AMERY.

ther the franchises, which are granted by record and depend upon it under the great seal, can be affected by an order of less authority. Now an order of privy council is no record. The king's privy seal does not make it a record. Admitting that the king could by his prerogative reserve such a power, it must be executed under the great seal of *England*. It appears therefore that this reservation in the charter and the exercise of it are illegal: but it is immaterial to the prosecutor in this case; because, if the power reserved were legal, the prosecutor has a right to avail himself of it by saying that it was exercised to the destruction of the corporation by the order which is found by the jury to have been signified to them. The corporators were to be removed *without further process*; and the actual amotion under this power, which is found to have been signified to the corporation, is equal to a judgment of ouster in a court of law. Then no election could be made of aldermen or common councilmen according to the charter of *Charles* the Second, for want of existing electors. And no such election can be made at this day; for the king never did in fact exercise his prerogative by appointing or restoring any of the persons so amoved, or filling up the offices. So that considering this charter as either legal or illegal, there must be judgment for the crown: if the first, as the record expressly avers the amotion of all the corporation in point of fact, there is an end of the question one way; if the latter, the king being deceived in his grant, the whole is void, and the defendant's title, which rests solely on the charter of *Car. 2.*, fails.

Charter of  
*Car. 2.* put  
an end to, by  
the order of  
amoval, or  
by the char-  
ter of resti-  
tution.

Under the second head of argument, it was contended that, even if the charter of *Car. 2.* ever had any legal effect, it was completely put an end to by the order of amoval, or by the charter of restitution, by which the old corporation were restored to their former liberties; so that the charter of *Car. 2.* was not the subsisting charter, which regulated the corporation of the city of *Chester* at the time of the defendant's election. First, It has been shewn that by the order of council all the corporators were in fact amoved, and thus the defendant's title fails. Or, Secondly, the old corporation was restored by the charter of restitution, which was equivalent to a judgment of restitution; and after a judgment of seizure it could not be contended that a judgment of restitution would have no effect, even if the king had in the interim granted another charter to a new corporation. By the restoring  
charter



charter of *James* the Second, therefore, the old corporation were in of their former rights, as appears by all the authorities. Several instances are mentioned by Sir R. *Sawyer* (a). The liberties of *Norwich* were seized into the king's hands. 13 *Ed.* 1. The liberties of *Norwich* were again seized, 21 *H.* 6. upon a presentment of a great riot taken before *Fortescue*; and afterwards *regranted* to them. 27 *H.* 6. *Pat. Rol.* 19. cited in *Cro. Car.* 252. The corporation of *Norwich* still exists, and is a corporation *by prescription*; which could not be the case if the former liberties had been destroyed by the first seizure. The liberties of the cities of *Oxford* (b), and *Southampton* (c), were likewise seized, and afterwards restored to them; and both those corporations are now also corporations by prescription. There are indeed instances of seizures of the liberties of the city of *London*, mentioned by Sir R. *Sawyer* (d). In the 16 *R.* 2. the liberty of the city was seized into the king's hands; on which other persons were appointed by the king in council to fill up the several places in the city during pleasure; in the same year the king granted to the aldermen, sheriffs, and citizens, that they might use their franchises as they did before the seizure, but with this clause of restriction, *quousque aliter ordinaverimus*; and in the 20 *R.* 2. the king made full restitution to them of their liberties. From hence therefore it appears that, though the liberties and franchises of the city of *London* were seized into the king's hands, the city was not only capable of accepting a re-grant, but that by the re-grant they were in of their ancient liberties notwithstanding an intermediate exercise of the liberties by other persons. *Pollexfen*, in arguing the *London* case (e), produces instances to shew that the corporate capacity, as well of the city of *London* as of other cities, was not even suspended by the seizure into the king's hands, but that the several corporations resumed their ancient functions by the re-grants made to them. And (speaking of the city of *London*) though a *custos* was appointed by king *Edward* the First, in the 15th year of his reign, who continued for eleven years, to the 26th of *Ed.* 1., yet even during that suspension the function of it's being a corporation still continued, and in point of fact several corporate acts were done by them during that time, such as holding their court of hustings; making a lease of a house belonging to the corporation; presenting sheriffs to the court of Exchequer, who were sworn in there; prosecuting certain persons for merchan-

1788.

The KING  
against  
AMERY.(a) *P.* 30, 31.(b) 32 *H.* 3.(c) 18 *Ed.* 1.(d) *P.* 37.(e) *P.* 106, 7.

dizing



1788.

The KING  
against  
AMERY.

dizing in the city, not being freemen; and determining a writ of right in the court of Hustings. From these authorities it appears that the acceptance of the charter of restoration, granted by James the Second, not only released the judgment *quousque*, with all the proceedings in the suit, and restored the ancient usages to the corporation, but also annihilated the charter of Car. 2. for the same reasons, and by the same authority that, it must be contended for the defendant, the charter of Car. 2. had superseded those of Hen. 7. and of Elizabeth; for being directed to the same body of men, they must be governed in their election by the directions of the last charter which they accepted, which in this case was that of James the Second, and this restored the ancient mode of election under the charters of Hen. 7. and of Elizabeth. To this the cases of *The King v. Larwood* (a), and *The King v. Maffory* (b), are applicable. Here again the judgment *quousque* must be considered as process to make a corporation amenable to the laws and government of their country; it is merely a suspension, not a forfeiture, of their rights; and the instant it has had the effect of compelling a submission to the court, like process against an individual to compel his appearance, the corporation are in possession of their ancient rights. If then the charter of Charles the Second, though good at the time of granting it, became void by the granting of the charter of restitution, no *scire facias* was necessary to repeal it, because it became void on a condition of law which was annexed to it.

Upon the whole, therefore, it appears that judgment must be given for the crown. Even if the jury had found all the issues against the prosecutor, the defendant would not have been entitled to judgment; for when the law is considered, they could not have been supported. But in a *quo warranto* information, if any one material issue be found for the prosecutor, there must be judgment for the crown. *The King v. Leigh*, 4 Burr. 2146. Now in this case it cannot be considered that the issues found for the prosecutor are immaterial, namely, that there was no final judgment of ouster, and that the order of amoval of the different officers was duly signified to them.

During the course of the argument, The Court suggested to the counsel that the pleadings appeared to be defective, and stated two objections to the replications, which they desired might be considered; but as the court in giving judgment took

(a) *Skin.* 574.(b) *Andr.* 295.



no notice of either of these objections, the arguments in answer to and in support of them are not here given.

1788.

The KING  
against  
AMERY.

Arguments  
for the de-  
fendant.

Arguments for the defendant.—In informations of this sort it is not disputed but that it is incumbent on a defendant, when called upon, to shew a plain legal title to the franchises which he claims. Now the defendant's title which he has here set forth, taken on the face of the plea, is regular and good; for he states a charter of incorporation by *Charles* the Second to certain persons inhabiting the city of *Chester*, which it is found was accepted by them, and he deduces a regular title under it. The first question therefore on the plea is, in substance, whether the defendant has or has not set out a good title. If the prosecutor can shew that the defendant's title, as set forth in the plea, is defective, there must be judgment for the crown. If not, the prosecutor must shew in his replication some defect for the purpose of avoiding that title which is regularly set out in the plea.

The first answer attempted to be given to the defendant's title is by disclosing in the first replication another part of the charter of *Charles* the Second, not set out in the plea, which contains a clause empowering the crown to remove any of the officers of the corporation; which power was exercised, before the defendant's election, to the destruction of the corporation; and therefore the defendant's election is void under that charter, because there were no persons left to elect. The second answer is, that before the judgment *quousque* there was an existing corporation under charters of *Henry* the Seventh and *Elizabeth*; and that after the judgment *quousque*, and after the charter of *Charles* the Second, there was a charter of restitution and pardon by *James* the Second, and consequently there was an end of the charter of *Charles* the Second. These objections may be reduced to three heads.

First Answer.  
Power of  
amotion.

Second An-  
swer. Char-  
ter of resto-  
ration to the  
old corpora-  
tion after the  
judgment.

1st, That *Charles* the Second had no right to grant the charter under which the defendant claims, there being at that time an existing corporation in *Chester*.

Objections  
to the defen-  
dant's title.

2dly, That the charter is either void upon the face of it, in respect of the power of amotion reserved therein; or that if the power reserved was legal, the corporation claiming under that charter have been actually destroyed and done away by the exercise of that power.

3dly, That the subsequent charter of restitution, which was accepted by the members of the old corporation, restored them



1788.

The KING  
against  
AMERY.1st. The  
power of  
Charles the  
Second to  
grant the  
charter.A corpora-  
tion may be  
dissolved.

to the exercise of their franchises; and consequently did away the charter of *Charles* the Second.

I. The power which *Charles* the Second had to grant his charter depending upon the judgment under which that power arose, it was contended on this head, 1st, That a corporation cannot be dissolved at all—2dly, That it cannot be forfeited if sued by it's corporate name—3dly, Nor by a judgment of seizure—4thly, Nor before appearance—5thly, That the judgment *quousque*, &c. makes it mere process to enforce appearance, and not a definitive operative judgment—6thly, That the king had not even the temporary possession of the liberties of the old corporation without a writ of seizure—7thly, That, even allowing the judgment it's utmost force, the liberties of the corporation were not so vested in the king by the judgment of seizure, as that he could grant them out to another body. That for all or some of these reasons the grant of the charter of *Charles* the Second was void; that the old corporation was never extinct, but at most only suspended; and that as two governing corporations with the same powers and jurisdiction cannot subsist in the same place, the latter grant must be null and void. It was incumbent on the prosecutor to maintain these propositions, as it is now the duty of the defendant's counsel to refute the arguments alleged in support of them. 1st, That a corporation cannot be dissolved is a doctrine not to be maintained in these days. Every franchise has a tacit condition annexed to it in law, that it be exercised properly. That of being a corporation is a principal franchise, where such an exercise of it is peculiarly necessary. And it requires strong and direct authorities to shew that the case of a corporation is an exception to the general rule. But except the opinion of the ten judges in the case of the corporation of *London*, only some loose dicta have been cited in support of it. The case of *Sir James Smith*, in 4 *Mod.* 58. is reported in a very confused manner; but in the same case, as reported in 1 *Show.* 274. *Eyre* thinks a corporation cannot be dissolved, only because it cannot be seized into the king's hands; if it could, then he admits it might. To which *Dolben* says it may; and *Holt* says expressly that a corporation may be forfeited. Many ways are pointed out in 1 *Black. Com.* 485. how a corporation may be dissolved; amongst others, by abuse of it's franchises. Mr. Justice *Blackstone* alludes in the same place to the proceedings against the corporations in the reigns of *Charles* the



the Second and *James* the Second, and says that they gave great and just offence in many instances; though perhaps, he adds, in strictness of law, the proceedings were in most of them sufficiently regular. In 1 *Show.* 280. *Holt* states it as clear law that a corporation may be dissolved. And the same doctrine is to be collected from the case of *Colchester v. Seaber* (a), where Sir *Fletcher Norton* admits that in his argument in the fullest extent. The same admission is in truth made by Sir *George Treby*, in his argument (b) in the *quo warranto* case against the city of *London*; for he allowed that all the Solicitor-General's argument upon that point, who was arguing in support of the dissolution, would hold true if the corporation would never appear. Again too the statute of *quo warranto*, 30 *Edw.* 1. was passed in order to let the parties in upon particular occasions; but it confirms the general position, that a corporation may be dissolved, as by disuse of its franchises. There then remains no express authority which says that a corporation cannot be dissolved, except the opinion of the ten judges in the House of Lords. The question, as stated by *Show.* and *Burnet*, in *The History of his own Times*, which was referred to the judges, is certainly incorrect; for it appears from the Journals of the House of Lords that the question referred was whether the seizure of a corporation was illegal, and not whether a corporation could be dissolved; therefore the court will not presume that the judges determined what was not before them. But besides the general authorities above cited, there are many cases decisive upon this head, which will be cited under several following heads of the argument, all of them tending to shew the futility of the objection.

2dly, As to the corporation in this case having been sued by its corporate name; such informations have never yet been decided in a court of law to be erroneous; it has only been thrown out in argument; and there are many precedents to warrant such proceedings. Perhaps it would be sufficient to refer generally to the instances mentioned by Sir *Robert Sawyer* in his argument (c). There is one however which deserves to be selected; that was the case of *New Malton* (d), *Tr.* 6 *Jac.* where an information was brought against the corporation by its corporate name for usurping the privileges &c. of a corporation without any authority, who pleaded by their corporate name, and entitled

1788.

The KING  
against  
AMERY.

Corporation  
sued eo no-  
mine.

(a) 3 *Burr.* 1866. (b) *P.* 28. (c) *P.* 31. (d) Sir *R. Sawyer's* argument, 6.

themselves



1788.

The KING  
against  
AMERY.

themselves by prescription, and verdict and judgment were given against them by their corporate name, and they are no corporation at this day. There are several other authorities to the same effect there mentioned. Then came the judgment in the *quo warranto* case against the city of *London* by their corporate name, in the reign of *Charles* the Second. Every authority subsequent to that judgment has tended to confirm the doctrine there laid down by the court. *Pollexfen* acknowledges in his argument (a) in that case that there are precedents in the crown office of *quo warrantos* brought against corporations *eo nomine* for usurping to be such, where they were also charged with claiming other liberties; and he mentions eleven instances. Now it is to be remarked that all the informations run in the same words, whether brought for abuses of franchises which have been legally granted, or for usurpation of them. It merely calls upon them to shew by what authority they exercise certain privileges; and till they put in their plea, it cannot appear whether they have any right or not. Besides, if it had been error in that case, there would have been no necessity for an act of parliament. As to the case cited from *Jenkins* 141. it is directly the contrary to 2 *Inst.* 282. and *Bro. Ab.* tit. *Quo Warranto*, pl. 11. This latter appears to be the same case as that in *Jenkins*, which is wrongly reported there. The arguments drawn by *Treby*, in his argument in the case of *London*, from corporations sole, are totally inapplicable to corporations aggregate. In the former case the principal concern is to keep the body politic separate from the natural body; but in the latter case the principal permanent appendage is that they may sue and be sued by their corporate name. Every other qualification is accidental, and depends upon the will of the grantor. When a suit is commenced against a corporation aggregate, every individual thereof is called upon as particularly as if he were specially named. When the offence committed is a corporate one, it should seem that they must be called upon in their corporate capacity. It is as it were a trial for their corporate life. The objection is more nice than substantial. Suppose any individual be sued by a name which he uses, if it be wrong the only possible way he could take advantage of it is by pleading in abatement. Suppose a man were to make a deed by a wrong name, he could not get rid of it by relying upon his right one. So

(a) P. 68.



if a corporation be sued for usurping to be such, the giving them the name by which they are sued is only for the purpose of compelling them to appear and answer; and if they do, it is clear that they cannot plead in abatement to a suit brought against them by their corporate name, as for a misnomer, for that would be to relinquish the very point in dispute. In truth the corporation could have no other name. The corporate name therefore is merely a description of the persons sued: they continue a corporation *de facto* till judgment; and that only can decide whether they are such or not. But even if a corporation could plead in abatement, it is sufficient to say, that in this case they did not; and it is a rule in pleading that whatever may be taken advantage of by a plea in abatement cannot be taken advantage of in any subsequent stage of the proceedings. Besides the law will not drive any person to the absurdity of suing every individual member of a corporation to the number perhaps of five or ten thousand persons; and it is for the sake of avoiding that absurdity that this mode of suing is allowed. However, at any rate, if it were wrong, it would only be error, and unless the judgment be reversed by writ of error it stands good.

3dly, and 4thly, It remains to be shewn that a corporation may be dissolved by judgment of *seizure, before appearance*. These two propositions are taken together, as they depend in a great measure upon the same authorities. Formerly, before the statute of *Gloucester*, 6 Ed. 1. the king exercised a power of sending commissions to enquire into the right to franchises, and if no charter were produced the liberties were seized into the king's hands, without any formal trial. 2 *Inst.* 280. This being much complained of, the statute of *quo warranto* was made in order to remedy the grievance. This statute seems to have been the foundation of the proceedings in *quo warranto*; the method is there set forth. It directs that such as had liberties should be permitted to use them, so as they made no encroachments on the crown, till the coming of the justices in eyre; and directs the sheriff to make a proclamation that all those who claimed liberties should be before the justices in eyre at the next assizes, to shew *quo warranto* they held them, &c. and they were allowed a certain time. But if the party came not before the justices in eyre, the franchises should be seized into the king's hands *nomine districtionis*; which the party in the same eyre might replevy: but if he did not replevy them while the eyre sat in

1788.

The KING  
against  
AMERY.

A corporation may be dissolved by judgment of seizure before appearance.



1788.

The KING  
against  
AMERY.

that county, the franchises *were lost and forfeited for ever.* 2 Inst. 282. And then Lord Coke goes on to say; therefore if the party now upon the *venire facias*, which this act gives, come not while the eyre set in that county, the franchises are lost for ever. And so it is in the king's bench, if the party come not in upon the *venire facias* during *that term*, and replevy his franchises, *they are lost for ever.* No case can be produced contradicting this authority; nothing but a *dictum*, and assertions of Treby and Pollexfen. But it is confirmed by many cases. 15 Ed. 4. 7. a *quo warranto* was brought for a market; the writ was returnable in *Easter Term*; the defendant did not appear. The *venire facias* issued returnable in *Trinity Term*; the defendant did not appear then. The question was, whether he should forfeit his franchise? By eight judges against two it was held that the franchise was gone for ever. The two held that he might still replevy it. The eight, that he could not replevy it after the term; and judgment of seizure was given unanimously. It is there said, the *quo warranto* was brought to call upon the party to shew his title; if he could, then he might retain his market: if not, then the king ought to seize it; and if the party might then have replevin, the king would lose the effect of his suit. And the party has lost his market by his own laches. And it is not against reason; for if the king grant one land by letters patent, which he had before granted to another, and the former have a *scire facias* against the first grantee to shew cause why his letters patent should not be repealed, and he make default to the *alias & pluries*, his letters patent are annulled by his own laches. It was afterwards doubted in that case in what form the judgment should be; and it was said that the judgment should be, that the market should be ousted; for it cannot be held as a market in the king's hands: to which it was answered, that it ought to be judgment of seizure; and that it would operate as an *extinguishment*. If the party had held the market by wrong and without title, then judgment should be of ouster. But if the king or his ancestors had granted it, and the party had misused it, then judgment should be of seizure. And one of the judges said, that he had seen such a judgment in the like case. But there, it not appearing whether the market commenced by wrong or by grant, for the uncertainty of it there was the greater reason why it should be judgment of seizure: and with this the other judges agreed as to the judgment which should be given.



given. This case proves that a franchise may be extinguished, which cannot be held by the king; and if so a corporation may also be extinguished: and with this agrees *Cro. Eliz.* 591. It also shews that it may be so by a judgment of seizure; and that that is the proper judgment even before appearance. And also that the seizure is for the benefit of the king; at least where the subject is such of which he can have benefit by having the power of granting that franchise out again. 2 *Bro. Abr.* tit. *quo warranto*, pl. 11. p. 186. and the same case under title Extinguishment, pl. 42. That the judgment of seizure was the proper one appears also from *Rex v. Staverton* (a), where it is said that if the party has continued in possession by wrong, judgment is that he shall be ousted; but if he had once a title and afterwards loses it, then judgment shall be that the liberty shall be seized. Sir Robert Sawyer also recognizes the same rule in the 17th page of his argument in the *quo warranto* case. The reason is, that in cases where the liberty or franchise has been usurped, the king cannot have that which never legally existed; but in cases of an abuser or nonuser of a franchise once lawfully granted, the king resumes that which originally flowed from his bounty. And the rule itself shews that by the judgment of seizure the king actually takes the liberty into his possession, and that it is not in the nature of process only. *Co. Entr.* 527. and 529. agree with this; and there are many authorities to the same purport in Sir Robert Sawyer's argument (b). But then it is argued, that these judgments vested no rights in the king, and that none of them put an end to the corporations themselves; and that, at the time of the *quo warranto* in the reign of Charles the Second, there had been no instance of a corporation's having been dissolved by such a judgment. It is true that the Recorder says so in his argument, because none had been produced by the Solicitor General. But two cases were afterwards mentioned by Sir Robert Sawyer (c), one of *New Malton*, before mentioned, *Tr. 6 Jac.* where judgment of seizure only was given against them, whereby they were dissolved; and there having been no re-grant to them, they are no corporation at this day. The other was the case of *Berkhampstead*, where judgment of seizure was given *pro defectu responsi*, which dissolved the corporation, and it has never been revived. In page 30 also of the same Argument is mentioned the case of *Oxford*, of which the liberties were seized

1788.

The KING  
against  
AMERY.(a) *Yelv.* 192.

(b) 30. 1.

(c) 31.



1788.

The KING  
against  
AMERY.

32 H. 3. by which the king was so completely in possession that when in the same year he pardoned them and granted them restitution, a writ issued to the sheriff to put them into possession. And again they were seized in 29 E. 3. and part of their liberties were granted to the university, which they enjoy to this day. These two last instances are very decisive, because they shew that by the seizure the liberties were transferred from the corporation to the king, because he directed the sheriff by his writ to put them into possession again: and secondly, it appears that by the judgment of seizure the corporation were so far divested, and the king so entirely possessed of their privileges, that he might grant them to another body. The judgment of seizure given against the city of *London* on the *quo warranto* information in the reign of *Charles* the Second is certainly an authority under this head for the defendant. The circumstances attending that decision have rather proved the legality of it than otherwise. Whatever stigma there may be annexed to it, it is founded on the severe advantage which was taken of an inadvertent act of the corporation, and not upon any supposed illegality in the judgment. And as to the question, whether a corporation is forfeitable, or can be dissolved by such a judgment, the arguments on which it was founded merit great attention; that of *Sir Robert Sawyer's* is conclusive. The stat. 2 W. & M. c. 8. does not say that the judgment was void, as *Dolben* observes in 4 *Mod.* 58. Indeed the act itself makes certain provisions upon the idea that the judgment was good; for it restores the city to its prescriptive rights. It was then clearly thought that they were dissolved, though they exercised acts *de facto*. If the judgment was thought bad at that time, why was it not reversed by error? The judges would have been willing enough, especially the ten, to have reversed the judgment by error, if they had thought that a corporation could not be forfeited, or at least could not be dissolved by a judgment of seizure. The question was afterwards discussed in *Smith's case* (a), whether a judgment of seizure in *quo warranto* was good against a corporation; and their conduct upon that occasion confirmed the judgment which had been given in the *quo warranto* against the city of *London*. For if they had really thought that the judgment was erroneous, they would boldly have said so. It was a popular opinion at that time; and they would not have taken pains to wave such

(a) 4 *Mod.* 54. 12 *Mod.* 19. 1 *Show.* 280.



an opportunity of declaring their sentiments by having recourse to a refined distinction. [BULLER, J.—The court in that case thought they were bound to take the judgment in the case of the city of *London*, as stated in the act of parliament.] *Holt* does not say, as the Recorder has supposed, in 4 *Mod.* 58, that a corporation cannot be dissolved; but according to the better report of that case in 1 *Show.*, *Eyre* thought it could not be dissolved because it could not be seized into the king's hands; if it could, then he admits it might. To which *Dolben* says that it may, and although *Holt*, who thought a corporation might be forfeited, was of opinion that the judgment of seizure was not *so proper* a judgment, yet he thought that it was no argument to say that, because the king cannot be a corporation, therefore he cannot seize one; for the meaning of seizure was to take it from him who had it. The cases before cited prove that seizure is the proper judgment, and *Holt* does not say that it is wrong, but only that the other is the better way. Therefore the argument from the judgment of seizure is at an end. The only authority cited in support of it is an anonymous case in *Jenk.* 141, which cites 15 *Ed.* 4. 7. which has been shewn to be directly the reverse: and all the other dicta are founded on this, which turns out to be an authority the other way. And whatever doubt there might be as to the corporation itself, yet even *Treby* (a) and *Pollexfen* (b) make no doubt but that liberties may be so seized and possessed by the king; and *Eyre*, in *Smith's* case, speaks to the same effect. The only argument, which remains relative to the effect of a judgment of seizure, is that several cities which have had such judgments against them still claim by prescription. Now whether this has been thought an anomalous case, and that the king's restitution could operate differently in this case from any other, in order to prevent the destruction of prescriptions for the public convenience, notwithstanding a dissolution, or whether the difficulty never occurred, cannot now be determined (c). Probably it never did, because there is no case upon the subject. And even if it were held to be of no avail, it would not be productive of any inconvenience, for it would only alter the nature of their plea. However it is not a sufficient objection in answer to all the direct authori-

1788.

The KING  
against  
AMERY.

(a) Page 13.

(b) P. 105, 6, &amp;c.

(c) Mr. Pollexfen urged this argument in case of the city of London, p. 106.



1788.

The KING  
against  
AMERY.

ties upon this point. Then as to the idea that there can be no final judgment till appearance, it is directly contradicted by the case before cited from the year books 15 Ed. 4. 7. by the passage from Lord Coke's *Second Institute*; and by a variety of other authorities. In Dy. 197, 8. many instances are given in *scire facias*, where if a party does not appear, the thing is forfeited at once into the king's hands. And indeed the consequence would be highly absurd if it were otherwise; for if a corporation had no lands or goods, they might remain for ever in contempt with impunity; and the public could have no redress. If they did not appear and answer to a *quo warranto* information, it could never appear whether the liberties claimed and exercised by them had been usurped or not; and for that reason it is that where they do not appear, the judgment has always been of seizure (a). The *London quo warranto* case, the act of parliament of 2 W. & M. sess. 1. c. 8., and *Smith's* case, decide this point.

Addition of  
the words,  
*quousque curia,*  
&c. makes on  
difference.

5thly, It is said that by the words *quousque curia alias ordinaverit* it appears that this judgment was mere process to enforce appearance, and not a definitive judgment. Now supposing that the judgment of seizure either dissolves the corporation, or seizes them into the king's hands, the question will be, whether the nature and effect of such a judgment is altered by the addition of those words. The natural construction of them is that the liberties are seized into the king's hands till the court shall make a further order; therefore if no such order is made they remain in the king's hands. But it is said that the party may at any time appear and claim them; and then if the king has a right to dispose of them in the mean time, the order of the court will be rendered nugatory, and the judgment will lose its effect. But that is not so; for it is plain from 2 Inst. 282. that if the party does not appear within a limited time, that is within the same term, and replevy the liberties, they are lost for ever. This judgment is founded on that doctrine. No mention is made there of any second judgment. There was indeed no occasion for any; because after the time limited by law for the party's appearance, the first judgment was irrevocable and final. The words *quousque &c.* are frequently omitted in these judgments of seizure: they are not used in *Brigg's* case (b), or in the case before cited of the 15 Ed. 4. 7. All the

(a) P. 17. of Sir R. Sawyer's argument.

(b) 2 Rol. Rep. 46.



cases prove incontestibly that after the term is elapsed, the party cannot come in without consent; and though the rule may have been departed from in the case of the city of *York*, yet that must have been by consent. There was at least no opposition made to it. It has been said that the judgment of seizure *quousque* &c. cannot take away the liberties, because the final judgment is of ouster; and 1 *Ld. Raym.* 17. was cited to prove it. But there is no distinction of that sort; for the judgment would be couched in the very same words as in the *quo warranto* case against *London*, and other cases: and the case in *Ld. Raymond* only proves that the judgment should be complete; and that a mere dismissal out of court, as *eat fine die*, &c. is no final judgment: Whether the judgment should be of seizure or ouster was not the question. But from all the authorities and from clear reasoning it appears that the judgment of seizure *quousque* &c. before appearance is not merely process, but a direct significant judgment, which becomes irrevocable if the party does not come in within the term. If it were mere process now, it must have been so in eyre: Now in eyre, if default were made, and the party came not within the eyre, he lost the liberties for ever. And if he had come in the day after the justices in eyre left the county, it would have been useless. Therefore it is absurd to say that the judgment *quousque* was to compel appearance, when appearance would have been nugatory. Now in this case the judgment of seizure *quousque* was given in *Hilary* term, 35 & 36 *Car.* 2. and the grant to the new corporation was not till the 37th. So that more than a term intervened. Then as to the necessity of there being office found, there is a short answer to it. Office is required only under the 8 *H. 6. c.* 16, which relates only to *lands and tenements* forfeited, where it does not appear on record what lands are forfeited. Thus it is clear that in point of law the old corporation were completely dissolved by the judgment of seizure *quousque* after the first term had elapsed. But they were also dissolved in point of fact; for supposing they might at any time have done away the effect of the judgment *quousque* by appearing before the court and reclaiming their liberties, yet in point of fact they never did appear, and no order having been made by the court subsequent to that time, the judgment still continues in force, and cannot now be done away by appearance, as all the members of the old corporation must necessarily be dead.

1788.

The KING  
against  
AMERY.

6htly,



1788.

The KING  
against  
AMERY.

Writ of seizure.

6thly, It has been objected that a writ of seizure does not appear to have issued on that occasion, because it is not stated on this record: but, comparing the language of this record with those produced by the counsel on the other side, it does not appear but that, if a writ of seizure were necessary, it did issue in fact. There is no entry to be found of a record at large; and there are no instances mentioned, in any of the records, in express words, of writs of seizure having issued, except in the cases of *Oxford*, 32 H. 3., and *Winchester* (a). But there are a vast variety of instances of such seizures, where no mention is made on the record of any writ having issued. If it had been necessary they certainly would have been mentioned. If it ought to have issued, there is every reason to suppose that it did in this instance. For the king had a right to seize, and it appears that his grantees were in possession for several years. That therefore was an actual seisin. But even if the court should think it necessary, yet if they see that it is not usual to state the writs of seizure on the record, they will not adjudge the want of it's appearing to be a substantial defect. But it should rather seem that a writ of seizure was not necessary at all in this case: for it could not possibly have any effect upon franchises that were neither visible nor tangible. How could the sheriff have seized such? The judgment itself is a seizure in law, and that is sufficient. *Saville* 70. speaks only of office found under 8 H. 6. Sir *George Reynel's* case (b) proves the very reverse of the position contended for; *Frustra fit per plura, quod fieri potest per pauciora*. Many instances are put in this case by Lord Coke, where the king is in possession at once upon office found. And, amongst others, it is there said that where a private person may enter without his action, as upon a condition broken, there an office without a *sci. fa.* shall suffice for the king. Now here that implied condition, which is annexed to every corporation, was broken by the old corporation. Besides Lord *Holt's* opinion in 1 *Show.* 275 is decisive; for he expressly says that no writ of seizure is necessary. And he gives as a reason for the distinction between the writs which were mentioned by *Pemberton* in that case, that where there are profitable franchises to be seized, the sheriff is to take them, and account to the king in the Exchequer. But where *incorporeal franchises* are to be seized, which in their nature cannot be profitable in the king's hands, as for example a

(a) Sir R. Sawyer's argument, p. 29.

(b) 9 Co. 95, b, &amp;c.



IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

557

1788.

The KING  
against  
AMERY.

court leet, there it appears from *Rastell's Entries* 540. that the leet was presently in the king's hands without any seizure at all. In such cases no writ of seizure is necessary. This is similar to the proceedings in *scire facias*; there if the party does not appear, the thing is seized into the king's hands at once. *Dy.* 197, 8. No case has ever been adjudged against *Holt's* opinion; for as to the *Malsbury* case being reversed, although this, amongst many other reasons, has been assigned by the counsel for the reversal, that there did not appear to have been a writ of seizure, yet that is merely conjecture, for it does not appear for what it was reversed. As to what has been said that there can be no replevy without a previous seizure; if the judgment is a sufficient seizure, that argument stops short. In the *York* case the corporation replevied, and yet there is no writ of seizure stated upon the record. From this last instance, and from the authorities before mentioned, it is clear, either that it is not necessary to issue this writ at all, it being only for the purpose of seizing an incorporeal franchise; or if it be necessary to be issued, there are circumstances sufficient to shew that it did in fact; and that the court are not warranted in presuming that it did not, on account of it's not appearing on the record, because it has never been usual to state it thereon; and in either of these cases it will sufficiently be made out that the liberties of the old corporation were completely seized into the king's hands by the judgment of seizure *quousque*.

7thly, It being now proved that a corporation, sued by their corporate name, may be dissolved by a judgment of seizure, by default in not appearing, and that the words *quousque* &c. are only form, and that no writ of seizure is necessary; it remains next to shew, of which there can be very little doubt, that if the king had a right to seize the liberties, he had a right to grant them out again to another description of persons. Even if the corporation itself, that is the ideal soul, was not dissolved by the judgment of seizure, according to what is suggested by *Eyre* in *Smith's* case (a), yet all the franchises being absolutely vested thereby in the king's hands, and the separation between the natural and politic body complete, the old corporation was out of it's place, and the king might substitute a new body in it's room. For even admitting for a moment that the judgment of seizure *quousque* is only in the nature of a *distringas* to compel

The king's  
power to  
grant the for-  
feited liber-  
ty to another  
body.

(a) 1 Show. 274.



1788.

The KING  
against  
AMERY.

an appearance, yet undoubtedly the effect of it was to displace the members of the old corporation for a time; and it was then competent to the crown to grant another charter to another body, to exercise those rights for the benefit of the public. For though two corporations cannot exist in the same place with the same powers, yet here the old corporation having been legally suspended and deprived of all their powers, the exercise of such rights by a new set of members could not at all interfere with them; because they had no powers left, and were a mere *caput mortuum*. Consequently two bodies with *similar powers* could not be said to exist at the same time in *Chester*. If this were not so, the misconduct of one set of corporators would deprive any place of the benefit of a corporation to regulate and govern them; and might be productive of the most serious consequences in such a city as *London*. So that even if the court should be of opinion that the king had only a defeazable interest in the franchises, still he might grant the interest which he had. In the case of *Altonwood* (a) it is expressly held that if the king hath a qualified fee-simple in land, that is to say, as long as a person attainted hath heirs of his body, and he grant the land to another and his heirs, the grant is good. So if the king hath an estate in fee-simple conditional, and grant the land to one and his heirs absolutely, it is good. So the king may grant a chose in action. *Bro. Abr.* tit. Chose in action, pl. i. 11. Tit. Patent 46. So the king may grant mere possibilities, *Jenk.* 210. Nor can the king be said to have been deceived in his grant in this case; for he might know that he had an interest liable to be defeated by the act of the court, supposing they had the power of making an order of restitution at any length of time afterwards; the contrary of which has been shewn. But even if he thought that he had a greater interest than he really had, it would not avoid his grant. 6 *Rep.* 55. b. But after the authorities which have been adduced, it can no longer be contended that the judgment of seizure did not totally divest the old corporation of all their rights and privileges, and vest them in the king. And there are strong and decisive authorities to shew that the king might grant them out again to another body like any other forfeited thing. In 32 *H.* 3. the liberties of the city of *Oxford* were seized, as before mentioned, and the king pardoned them the same year, and granted them restitution, and a writ issued to

(a) 1 *Rep.* 49. b.



the sheriff to put them into possession; and again they were seized 29 *Ed.* 3. and part of their liberties granted to the university, which they enjoy to this day. From thence it appears that by the judgment of seizure against the corporation the king was so entirely possessed of their privileges that he might grant them to another body. The same argument arises from the university of *Cambridge*, part of whose privileges were taken from the corporation and given to the university under similar circumstances. And as to those instances of corporations seized which have continued to act, they have been where the king has exercised a control by appointing a *custos*, which was in fact a temporary grant. Frequently there has been a subsequent charter which revived them. Sometimes, as in the two instances above-mentioned, he has only restored part of their liberties, and given away the rest. As to what was said that the grant tended to destroy the franchises of the seven persons excepted out of the new charter, and therefore that it was void; the answer is that it was not the grant, but the prior judgment, which destroyed those franchises. That charter being directed to the inhabitants and citizens at large, and particularly excluding those seven persons, is a demonstrative proof that it was given to a different set of persons, and not to the old corporation, as has been contended (a).

II. The second head of objections raised by the prosecutor to the defendant's title is, that whatever right King *Charles* the Second might have to grant the charter under which the defendant claims, yet that that charter is void upon the face of it, in respect of the power of amotion reserved therein, if illegal; or, supposing it to be good, that it has been since avoided by the actual exercise of that power by *James* the Second. It was argued on this head that the intention of the king in reserving the power in question was to amove *all* the members of the corporation, because *James* the Second actually made an order to that effect: that if such a power as this were bad, it avoided the whole charter, because the king was deceived in his grant, inasmuch as he plainly intended to reserve to himself a greater power than by law he was enabled to do, it being one of the terms of his grant. This mode of reasoning is making the king the expounder of his own grant; and not only that, but it makes King *James* the Second the expounder of the intention of *Charles* the Second,

1738.

The KING  
against  
AMERY.

Power of  
amotion re-  
served in the  
charter of  
*Charles* the  
Second.

(a) Vide 1 vol. 583, 4, 7.

and



1788.

The KING  
against  
AMERY.

and in a manner directly repugnant to the general tenor of the charter. The intention was a matter of fact to be found upon the deed. All the words of the deed are to be taken together; and where the intent is doubtful, the grant must be so expounded as not altogether to destroy the effect of it, and dissolve the corporation. It is a well known principle in construing the king's grants, that where one construction will make it good, and another bad, the first shall be adopted. 1 Co. 45. 10 Co. 67. b. To apply that to the present case: If this clause be only to amove some of the corporators, it is good; if to amove the whole corporation, it is bad: the court therefore must adopt that construction which will make it good, if they are by any means warranted in so doing; *ut res magis valeat quam pereat*. Now Charles the Second could not mean to reserve a power of destroying the corporation, for he expressly provides for a continuation of it under every exercise of the power reserved; for in the same clause in which the power is contained there is a provision made for filling up the vacancies by the remaining electors, which could not be if *all* were to be amoved. The court will not presume a fraudulent intent concealed under the terms of the charter. 1 Rep. 52. b. The king might reserve a power of amoving some, provided he left a sufficient number to elect and fill up the vacancies; and this is the true construction of the charter. There is no occasion however at present for the court to draw the line; it would be sufficient to say that this is far beyond the line. And though it is said in *Warren's case* (a) that a custom to remove a freeman *ad libitum* is void; yet that was spoken concerning such a claim by a corporation itself, and therefore is wholly inapplicable to this case. But it is expressly said in *Braithwaite's case* (b) that under a power reserved the king and council might amove any particular member of a corporation. Therefore the power was legally reserved, although the attempt to exercise it in the extent in which it was done was illegal and void. The charter is a grant of a corporation for public purposes, beneficial to the realm; the regular and lawful power to grant such franchises is for the public benefit; the power of removing particular corporators therefore from their offices, when, in the judgment of those by whom they were originally constituted, they no longer fulfil the ends of their institution, cannot be illegal. They are like all other offi-

(a) Cro. Jac. 540.

(b) 1 Ventr. 20.



cers under the crown, except the twelve judges who were lately excepted by act of parliament, amenable to the crown for the due exercise of their functions. Justices of peace for counties are certainly removable; and surely there cannot be greater danger to be apprehended to the constitution in suffering justices in a town to be removed than justices in a county. No substantial reason can be urged why the former should not hold their offices by the original grant during pleasure as well as the latter, or any of the greater officers throughout the kingdom. It is admitted fully, as a general principle, that when a person is in the full possession and enjoyment of a franchise under a grant, he cannot be removed by the power of the crown without some process of law for an abuse of it. But that principle does not apply here; for the members of this corporation accepted the charter of *Charles* the Second on condition that they should be removed whenever the king pleased, under the restriction above-mentioned, that there be left a sufficient number to elect others in their room. The power is inherent in the grant itself; therefore it does not interfere with the general law. And as to its being done by an order of privy council, the king may act in his privy council if he pleases; and he does so act by the constitution in many instances. But then it is said that by the express words of the power the king might amove *one or more*, and that no line can be drawn beyond which the king might not amove under those words, and therefore he might as well amove all as two; and that such a power being bad, the whole charter is void, because the king is deceived in his grant in thinking it good; and for this were cited 2 *Rol. Abr.* 164. 2 *Inst.* 533. 5 *Rep.* 55. b. 2 *And.* 156. 2 *Freeman* 17. 1 *Co.* 43. These authorities when examined prove nothing to the point. The case in *Rolle's Abr.* only proves that the king cannot grant against law; that is, cannot grant that an estate shall descend against the rules of law. The passage from 2 *Inst.* shews that the king cannot grant new offices with new fees, without act of parliament, which is not disputed. The third authority only shews that if the king pass more than he can grant, it is void. As to the case in *Anderson*, it appears that the king was mistaken in the estate which he had. In 2 *Freeman* 17. the king was deceived in point of fact in the very substance of his grant; *sed cur. adv. vult.* *Hob.* 220. is to the same effect. In the case in *Freeman*, King took a difference where the king was deceived in his fact or his law; if

1788.

The KING  
against  
AMERY.



1788.

The KING  
against  
AMERY.

in the latter, the whole grant was not void; and 1 Co. 43. only says that if the king grant an estate which is not good in law, nothing shall pass. But it is an answer to all these cases to mention what has been already cited, that if the king to a grant annex a condition which is void in law, the condition is void, and the grant is good for the rest. As if the king should grant an estate in fee simple, and say that it should not descend to the eldest son, the condition would be void. And 6 Rep. 55. b. agrees with this principle. Now whether the king was deceived or not in this instance depends upon the meaning which he entertained. If he did not mean to reserve the power of dissolving the corporation, he was not deceived; and if no such power were reserved, then it could not be exercised to any effect. It does not appear in fact that the aldermen ever were amoved; it is only stated in the pleadings that an order was made by the privy council, which was *signified* to them, and they were *thereby* amoved; that is, by the signification of the order. But if that order were not binding, it could not have any effect. Then there was no amoval of the aldermen; and the conclusion drawn in law is false. But if the court should be of opinion that the king really did reserve the power of amoving all, then the reservation is repugnant and void; repugnant, because the first clause gives to the mayor, citizens, &c. their powers and privileges for ever; and in the latter clause, the king reserves a power of abridging the interest he had before given. Now if two clauses in a deed are repugnant, the first shall be received, and the last rejected. *Shep. Touch.* 85. *Hard.* 94. If one make a lease for ten years at will, this is a good lease for ten years certain, and the latter words are void for repugnancy. *Bro. Abr.* tit. *Lease*, 22. This is a clear authority in point. In 2 *Inst.* 496. Lord Coke gives this as an excellent rule for the construction of the king's patents, not only of *liberties*, but of lands and tenements, that they have no strict or narrow interpretation for overthrowing them, *sed secundum earundem plenitudinem judicentur*; that is, to have a liberal and favourable construction for the making of them available in law, *usque ad plenitudinem*, for the honour of the king. 1 *Rep.* 45. 10 *Rep.* 67. b. 6 *Rep.* 6. a. In 17 *Vin. Abr.* tit. *Prerog.* page 100. it is said there is a difference to be observed in all cases where the king is said to be deceived in his grant: If the matter which is false in the letters patent be suggested on the part of the grantee, and that to the prejudice of the king,



king, there the king shall be said to be deceived in his grant, so as to make it void; adjudged in *King v. Kemp*, T. 7 W. & M. 12 Mod. 78. But where the words of the letters patent are the words of the king, *ex certâ scientiâ et mero motu*, as in this case, *although the king appears by his inference to be mistaken in his law*, yet the king shall not be said to be deceived so as to avoid his grant; and *Viner* cites numberless authorities in support of this distinction. So also 1 Rep. 49. *Jenk.* 255. 3 Com. Dig. 452. 4 Bac. Abr. 210. 6 Rep. 55. *Skin.* 663. 8 H. 7. fo. 3. Dy. 197. 352. 11 Rep. 2. *Curle's case*, are to the same effect, where the grant flows *ex mero motu*, and the words of the king himself. And even false suggestions which are not of the essence of the grant will not avoid it. *Hob.* 220. Here the grant is *ex certâ scientiâ et mero motu*; they are the words of the king. From the very nature of the thing there could be no false suggestion of the party, for the corporation would not suggest any thing against themselves in derogation of their interests. There is no deceit or mistake in fact; if there is any mistake, it is a mistake in law of the king's own; and it not being the condition on which the grant was made, in such a case it has been shewn above that the grant shall be valid as to the rest. And there is no doubt but that a charter of incorporation, like other grants, may be good in part, and bad in part; as in the case of the college of physicians, mentioned by Mr. Justice *Blackstone* in his *Commentaries*, 1 vol. 481. From all the authorities which have been adduced it clearly appears that the reservation of a power to amove *all* the members of the corporation, being repugnant to the spirit and substance of the grant, is therefore void; but that the rest of the charter remains good. But if the meaning of the power is to amove *some* of the corporators only, even though that should be void, those cases apply still stronger; and if it be good, then the removal of the whole is without authority, and the conclusion in the replication is wrong. In either case the rest of the grant is good, as not coming within those cases wherein the king is said to be deceived in his grant. The order of amoval therefore could have no operation whatever. But supposing upon one or other of the grounds contended for that the charter of *Charles* the Second was voidable; that the king could not have rightly made that grant; or that it was voidable for matter appearing on the face of it; yet it was good till the letters patent were repealed. They ought to have been repealed

1788.

The KING  
against  
AMERY.

Letters pa-  
tent valid till  
repealed.



1788.

The KING  
against  
AMERY.

repealed either by petition or *scire facias*. *Bro. Abr.* tit. *Petition*, pl. 12. tit. *Jurisd.* 102. tit. *Sci. Fa.* 58. 63. 173. In a case where the king granted letters patent for a fair, where he had granted another before, the second letters patent, although void on that account, yet were in force till repealed by *sci. fa.* 3 *Lev.* 220. So in *Dy.* 197, 8. many cases are put to shew that letters patent, though void, must be repealed by *sci. fa.* So *Keilw.* 134. Judgment must be given to reverse the king's grant. These authorities prove that whether the patent be rightly granted or not, yet so long as it remains unrepealed it is in full force. *Bro.* tit. *Traverse of Office*, 52. is directly in point.

Charter of  
restitution.

III. The judgment being established to be a valid existing judgment against the old corporation, the next question is, whether any thing is stated in the second replication to do away the effect it would naturally have. It is contended that this was done by the charter of restitution. But it appears that the king had granted out the same franchises to another body of men in the mean time, which he might well do if the judgment were good. It was indeed argued that the two latter charters were granted to the same body of men, and therefore that as the acceptance of the charter of *Charles* the Second altered the ancient mode of election, so it was revived again by the subsequent acceptance of the charter of *James* the Second. But it appears most evidently that those two charters were directed to, and accepted by, two different descriptions of men. For first, the charter of *Charles* the Second was not addressed to the corporators as a distinct body, but generally to the citizens and inhabitants; again too, there is even a particular exception of some of the members of the old corporation; in both which instances it differs from the charter of *James* the Second. Then if the second charter were good at the time it was granted, and if no legal course of proceedings appear to oust the grantees under that charter, nor any previous removal of the members whereby that corporation ceased to act, it was not competent to the crown to re-grant the same franchises again to another body, who had been legally dispossessed of them, which he had before granted. The judgment which had been given in this court was a security to the new grantees of the crown, which the king of his own authority could not then reverse, and which the court themselves could no longer do away after the old corporation had



had failed to come in within the course of the next Term. It still remains of record against them. The king was precluded by his intermediate act from restoring the old corporation. A pardon can never have a retrospective view with regard to third parties. If the king grant lands, forfeited to him upon a conviction of treason, to a third person, he cannot afterwards by his grant divest the property in favour of the original owner. In such cases the king can only pardon the effects of the judgment not already executed. In 2 *Hawk. P. C.* 392. it is said, the king cannot by his pardon bar any interest before vested in the subject. Nor can he grant the same thing in possession to one, which he or his progenitors have granted to another. 1 *Rep.* 45. 51. *Jenk.* 126. In 3 *Inst.* 236. Lord Coke recognises the old and constant rule of law, *non poterit rex gratiam facere cum injuriâ et damno aliorum, quod enim alienum est dare non potest per suam gratiam.* And under the head of *Restitutions*, in the same book, page 240. he gives the reason wherefore the king may by his charter pardon the execution, and restore the party or his heirs to lands forfeited by attainder, *and remaining in the crown*, for that no person hath thereby any prejudice; but he cannot restore blood without an act of parliament, because it would be a prejudice. So 2 *Mod.* 52. *Bro. Abr. Charter Pardon*, 44. *Skin.* 676. The grant being made to the old body can make no difference. He could no more grant to them than to any others what he had before bestowed. Besides, by the charters of *Hen. 7.* and *Eliz.* the mayor was to be elected annually; now the person who held the office of mayor at the time of the judgment must have been *functus officio* long before the charter of restoration; and then that grant was made to a body without a head, and therefore void; for which *Co. Lit.* 264. *a.* is in point. Therefore, if the liberties of a corporation are seized, and they do not appear and replevy them before the mayoralty is expired, the re-grant is void for want of a head to whom the liberties can be restored. During the time the old corporation were so suspended there was not even an election *de facto*; and therefore this doctrine applies in its fullest extent.

*Cur. adv. vult.*

ASHHURST, J.—now delivered the opinion of the court.

After stating the pleadings as above—he said, on these pleadings three questions naturally arise. First, whether king Charles the Second, at the time of granting the charter mentioned in the

1788.

The KING  
against  
AMERY.



1788.

The KING  
against  
AMERY.

plea, had the power of creating a new corporation in the city of *Chester*. Secondly, whether the charter itself be a good one; and, if it be, what is the effect of the amotion of all the members. Thirdly, what was the effect of the charter of restitution by king *James* the Second. The first of these questions must depend on the effect of the judgment *quousque* given in *Hilary* Term 1683, which judgment clearly remained in force in *February*, 37 *Car.* 2., 1684-5, when the charter was granted under which the defendant claims. That the judgment of seizure was legal at the time it was given is clear from the authorities in all the books. It was founded on the default of the corporation who then had not, nor did at any time afterwards appear to the information. A year elapsed before the crown did any act in consequence of the judgment of seizure, and then the crown granted a new charter. The question then is, whether, without a previous *final judgment*, the king had a power of granting this charter. One thing seems clearly established in the case in the year book, 15 *Ed.* 4. namely, that when the proceeding was in the court of eyre, if the party did not come in during the eyre, the franchise was forfeited for ever; and though the judges differed in opinion as to the practice in the king's bench, none of them denied that the law was such in the court in eyre. This then clearly establishes this position, that a final judgment of seizure as forfeited is not essentially necessary to create the forfeiture; for if it were, such judgment could never have been given in the court in eyre, for the corporation had a right to appear at any time during the eyre, to the very last instant; and after the iter was determined, the power of the justices in eyre was at an end, and they never could enter a final judgment. If then a final judgment be not of the essence of the forfeiture, why should such final judgment be essentially necessary in the court of king's bench. The cause of forfeiture is the contumacy of the corporation in not appearing at the time prefixed to them for that purpose; and that contumacy equally exists when the proceedings are in the king's bench, if the corporation do not come in, and appear in due time. The justices in eyre, after the eyre determined, shall send their records in bank, which is *banco regis*, and the same execution, and the same form of execution, as before the justices in eyre, shall be pursued as before the justices in bank. *Bro. Abr.* tit. Judges, pl. 8. The information filed by Sir *Robert Sawyer* called upon the mayor



mayor and citizens to shew by what authority they claimed to be a corporation. *Non constat* by that information that there was any corporation in *Chester* either by charter or prescription. The information imports the contrary, for it charges them with having usurped the name, privileges, and authority, of a corporation without any legal right. If any charter or prescription existed, it was incumbent on the defendants to have appeared and shewn it; and by not doing so they admitted that there was neither charter nor prescription to warrant such usurpation. All franchises may be lost by non-user or neglect; and the strongest case of non-user or neglect is that which appears on record, when the parties are called upon in a court of justice to state their right, and they neglect or refuse to do it. In the year book 15 *Ed. 4.* it is said that if a person outlawed obtain his charter of pardon, and sue a *scire facias* against the plaintiff, who, being summoned, does not appear, the charter of pardon shall be allowed for ever, and it shall not be allowed *salvo jure petentis*; for by common intendment, when he is summoned and will not come, he will not pursue his writ. Again it is said that letters patent shall be avoided by reason of the party's neglect, and if he surcease his time, it is reason that he shall lose his franchise, and the judgment shall be that the franchise shall be seized, &c. and this shall enure by way of extinguishment. So in the present case, the corporation, having surceased their time, shall lose their franchises for ever. But it is said, that in many of the cases cited, a final judgment was entered in the term after the judgment *quousque* was given, and that these instances prove the necessity of such judgment. To this it may be answered, that there is no formal adjudication that such judgment is necessary; but, as there had been some contrariety of opinions, it might be done *ex abundanti cautela*, or to shew the election of the crown to take advantage of the forfeiture. But that does not prove the absolute necessity of it, and there is no reason why it should be absolutely necessary in the king's bench, when it clearly was not so in the courts in eyre. The authority of Lord Coke, 2 *Inst.* 282. seems strong to this point. Lord Coke there says, if before the justices in eyre the party came not, the franchises should be seized into the king's hand *nomine districtionis*, which the party in the same eyre might replevy; but if he did not replevy them while the same eyre sat in the county, the franchises were lost and forfeited for ever. Therefore if the party now upon the *venire facias* come not whilst the eyre sit in that county,

the

1788.

The King  
against  
AMERY.



1788.

The KING  
against  
AMERY.

the franchises are lost for ever; and so it is in the king's bench, if the party come not in upon the *venire facias* during that term and replevy his franchises, they are lost for ever. There have been some doubts whether they might not come in during the next term, though the authority of Lord *Coke* is to the contrary; but that is not material to be considered in the present case, because they never did appear previous to the granting of the charter, which was a year after. If then the parties could not come in but during the term in which the *venire* was returnable, or at all events in the next term, unless by grace and favour of the crown, the only possible use of a final judgment must be to shew the crown's election to take advantage of the forfeiture; and if that is the case any other matter of record, shewing that election, may equally answer the purpose. The granting of a new charter therefore, inconsistent with the former, will amount to a declaration on record, that the crown elects to take advantage of the forfeiture, and that is all that can be necessary where the corporation had no means of ever redeeming the forfeiture. It would be endless to go through all the cases which have been cited at the bar, in which there is a great deal of confusion and contradiction; and therefore, though we have considered them, we think it better to state the authorities on which we rely, and which seem to us to have the strongest reason on their side.

This then being our opinion on the first point, the next question is, whether there is any defect in the charter itself which is sufficient to vitiate it. The objection which has been taken to it is, that the power of amotion reserved in it, as it extends to the amotion of the whole body, is repugnant to the charter, and therefore makes the whole void. But we are of opinion that on the sound construction of the charter taken altogether no such repugnancy will occur; for that charter having in one part provided, that on every amotion the corporation shall proceed to a new election according to the mode prescribed, the power of amotion reserved must be understood *sub modo*, namely, so as not to destroy the whole body at once, and thus make it impossible to elect others. And taking that to be the construction, the subsequent amotion of all the members at once was arbitrary, illegal, and void.

The third and last question then will be, what is the effect of the subsequent charter of restoration by king *James* the Second; and as to that we are of opinion that it was a void charter,



charter, and of no effect. For though it is competent to the crown to pardon a forfeiture, and to grant restitution, that can only be done where things remain in *statu quo*, but not so as to affect legal rights properly vested in third persons, which is the case here; for *Charles* the Second whilst the forfeiture existed had incorporated a new body of men in the town, and invested them with new rights; which, being done, it would not have been in the power of *Charles* the Second, and of course it was not in the power of his successors, to defeat an interest once legally vested in such new corporation; and there cannot exist in the same place two independant corporations with general powers of government: and therefore we think that such charter of restoration was absolutely void and of no effect. Therefore on the whole there must be judgment for the defendant.

Rule absolute.

SAMUEL *against* EVANS.

**D**EBT on a bail bond. The declaration stated that on the 5th July 1786 the plaintiff sued out a *pluries capias*, directed to the sheriff of *Monmouthshire*, commanding him to take the defendant if he should be found in his bailiwick, so that he might have his body before our lord the king at *Westminster*, on Monday next after the morrow of *All Souls* [the sixth of November] to answer &c. That the sheriff arrested the defendant on the 4th November 1786, and detained him by virtue of the arrest; and that, the defendant being so arrested, the sheriff took bail for his appearance; and the defendant and one *Ball* on the 4th of November became bound to the sheriff in 20*l.* conditioned for the appearance of the defendant on the Morrow of *All Souls* [the third of November]; that the defendant did not appear at the time therein mentioned, whereby the bond became forfeited, and the sheriff assigned the bond to the plaintiff in the usual manner. Plea *non est factum*. On the trial the plaintiff obtained a verdict. And a rule having been made to shew cause why the judgment should not be arrested, on the ground that the bond was void under 23 *Hen. 6. c. 9.* because it appeared on the face of it to have been taken after the return of the writ as stated in the condition;

7 G

Lane

1788.

The KING  
*against*  
AMERY.

Monday,  
May 26th.

The statute 23 *H. 6. c. 9.* relating to bail bonds is a public act, therefore the court will take notice of it though it is not pleaded. And if it appear in a declaration, by the assignee of the sheriff, on such bond, that the bond is void by the provisions of that statute, the court on motion will arrest the judgment, after verdict against the defendant, upon a plea of *non est factum*.



1788.

SAMUEL  
against  
EVAUS.

*Lane* now shewed cause; and contended, first, that the statute 23 Hen. 6. c. 9. must always have been pleaded; and secondly, that it was equally necessary since the statute 4 Ann. c. 16. s. 20. as before. As to the first: it is not necessary to maintain that the 23 Hen. 6. c. 9. may not be deemed a public act, but it ought to have been pleaded. The only cases which favour a contrary doctrine are *Bentley v. Hore* (a), *Okry v. Sell* (b), and *Mills v. Bond* (c). In the first of those the question was whether the sufficiency of the bail was traversable; the court held that it was not, and gave judgment for the defendant. And the only part of that case, which favours the opinion that it need not be pleaded, is a dictum of *Twysden, J.* Who said "That it was held by *Rolle* and *Glynn* when they were chief justices, that the statute 23 Hen. 6. was a general law, of which the king's courts will take notice without pleading it." But this is not mentioned in the report of the same case in *Siderfin* 96. And on another occasion (d) *Twysden J.* gave a contrary opinion; and said "that the statute 23 H. 6. had lately been held to be a private statute, of which the court could not take notice unless it were pleaded." In *Okry v. Sell*, *Hale Ch. J.* held, first, that the statute 23 Hen. 6. was a general law, of which the court must take notice without pleading; and secondly, if it were not, that that obligation was void by the common law. But that was adjourned; and no judgment appears to have been afterwards given upon it. And even if any judgment had been given, it would not have determined this question, because the obligation in that case was void at common law. The case in *Strange* was determined on the ground of the process being void; and therefore it is not applicable to this case, where no objection can be taken to the process. Those are the only cases which tend to establish the point that the statute 23 H. 6. need not be pleaded; for the question only arose collaterally in *Boyce v. Whittaker*, *Dougl.* 93. and even there what was said by *Davenport* at the bar, that the statute had always been set out, was not denied by the court. But on the contrary there are many authorities which decide that it must be pleaded. *Bro. tit. Office del. Court*, pl. 27. The act relates only to officers, and is not general, but particular in a generality. It is said in *Holland's*

(a) 1 Lev. 86. 1 Sid. 96. (b) 2 Lev. 103. (c) 1 Str. 399. (d) 2 Saund. 155.



case (a) that *office* is a general word or genus, *sheriff* is a special word or species; and *sheriff of Norfolk* is *individuum*: and the statute 23 *Hen. 6. c. 9.*, which extends only to sheriffs, is but a particular and special act, as it is held *Dyer 119. a.* In *Norton v. Simms* (b) which was an action brought by the high-sheriff on a bond given to him by the under-sheriff, the case was determined not to be within the 23 *H. 6.* for three reasons, one of which was, "because the statute was not pleaded, being a special law." In *Humberton v. Howgill* (c), The court said "you cannot plead *non est factum* generally to the statute of sheriffs." So in *Whelpdale's* case (d), they said "If a bond be made to the sheriff against the statute of 23 *H. 6. c. 9.* the obligor ought to plead the special matter, and not to plead *non est factum*; and therewith agrees 7 *E. 4. 5. b.* 7 *E. 6.*" So also in *Hob. 166.* "A sheriff's bond against the 23 *H. 6.* is utterly void; and yet you cannot plead *non est factum* to it, but you must plead the special case. 1 *Mod. 58.* and 2 *Saund. 154.* are to the same effect. In the case of *Dive v. Manningham, Montague, Ch. J.* (e) said "As to the exception that the act [23 *Hen. 6. c. 9.*] is a particular act, and ought to be recited at large, I agree that he ought to recite the act; for the act is particular in a generality, that is, it is universal to all sheriffs and officers contained therein, and inasmuch as it is not general to all the king's subjects, but only to all the said officers, it is well called an act particular in a generality. And therefore in 13 *Ed. 4.* it was held that an act of parliament, by which all corporations and licences granted by king *Henry the Sixth* should be void, ought to be pleaded, and the court is not bound to take notice of it, no more than of a particular act touching a particular person: and so in our case *the act ought to be pleaded.*" The case of *Grabam v. Crawshaw* (f) peculiarly applies to the present; that was debt on a sheriff's bond, conditioned to appear on *Monday* next after eight days of the purification; the defendant pleaded that *Hilary* term finished on *Sunday* next after the Octave of the Purification, that no court was held at *Westminster* on *Monday* next after the Octave of the Purification, so that he could not appear according to the condition of the bond: the plaintiff demurred and had judgment, for the condition being impossi-

1788.

SAMUEL  
against  
EVANS.(a) 4 *Co. 76. a. b.* 19 *Vin. Abr. 498.*

C. 9.

(b) *Hab. 12, 13.*(c) *Hob. 72.*(d) 5 *Co. 119. a.*(e) *Plowd. 64, 5.*(f) 3 *Lew. 76.*

ble,



1788.

SAMUEL  
against  
EVANS.

ble, the obligation is single according to *Co. Lit.* 206. *a.* And that case proceeds to say, "note, the defendant did not plead the 23 *Hen.* 6. for if he had pleaded the obligation to be without condition, or condition impossible, which is all one, it had been void by the statute." Now in the present case the bond was given on the 4th *November* conditioned to appear on the *Morrow of All Souls* (the 3d *November*); then according to the last case as the condition was impossible, it became a single obligation. All these cases clearly establish this point at least that the court cannot take notice of the 23 *Hen.* 6. unless it be pleaded. Secondly, The statute 4 *Ann.* c. 16. s. 20. has not made the 23 *Hen.* 6. a public act, nor taken away the necessity of pleading it. The statute enables the sheriff to assign the bail bond or other security, taken from the bail, and directs that the court shall give such relief upon such bail-bond, or other security, as is agreeable to justice and reason. It appears therefore from the terms of this statute that the legislature looked to other security than the bond directed to be taken by the 23 *H.* 6. So that a single obligation may be taken for the defendant's appearance, according to the recognition of this statute. In the present case therefore as the condition is impossible, it may be rejected, and the bond which was thus taken without condition, having become forfeited, may be enforced, as that other security which is allowed by the statute of *Ann.* Two cases have arisen since that statute, which shew that the 23 *Hen.* 6. c. 9. must still be pleaded; in the former of them, *Fort.* 365. it was actually pleaded; and in the other, *Fort.* 366. it was objected that the bail-bond being more than the sum in the writ makes the bond void: but the court held if it were void, the statute ought to be pleaded.

*Morgan* in support of the rule. It is to be observed that this action is not brought by the sheriff, but by his assignee, who is such by virtue of a public law, 4 *Ann.* c. 16. which alone is sufficient to do away the objection that the statute of 23 *H.* 6. ought to have been pleaded. For it appears on the face of the plaintiff's own declaration that this bond was assigned to him by the sheriff; and it could only have been taken by the sheriff under the statute of *Hen.* 6th; for till then a sheriff had no right to take such a bond for the appearance of the party. 10 *Rep.* 100. That statute gives the sheriff authority to take a bond from a prisoner in a certain form: if taken in any other than



than the exact form prescribed, it is void. Now here it is plain that the condition of the bond is impossible, for it is to appear on a day passed; and the sheriff could not by the statute take a bond for an appearance before the day on which the bond was given. The principal cases which have been mentioned as tending to shew that this statute ought to be pleaded are before the statute of *Anne*, when the action must have been brought by the sheriff himself, and then it did not appear on the face of the declaration that the bond was given under that statute; so that it was incumbent on the party either to plead the special matter, or to craveoyer of the condition, and demur. If it could have appeared on the face of the declaration that the bond was given under that statute, and that the condition was not such as is required by it, there is no doubt but that the defendant might have demurred. But there are many authorities, before the statute of *Anne*, to shew that the statute of *Hen. 6th.* is a public law of which the court are bound to take notice. In *Bentley v. Hore* (a), *Twysden, J.* said that it had been held by *Rolle* and *Glynn*, when they were chief justices, that the statute 23 *H. 6.* was a general law, of which the king's courts ought to take notice without pleading it. The same was held by *Hale, Ch. J.* in the case of *Oky v. Sell* (b). And according to the case of *Graham v. Crawshaw* (c), if it appear on the face of the record that the bond was a sheriff's bond, and it is either without condition or condition impossible, which is all one, it is void by the statute. And in *Boyce and Whittaker* (d), it is clear that Lord *Mansfield* considered it as a public act. But if there had been any doubt before, the statute of *Anne* must have done it away. And that was expressly held in *Saxby v. Kirkus*, *H. 27 G. 2.* which is mentioned in *Buller's Nisi Prius* 224; where it is said that, though it be regularly true that a private law shall not be taken notice of unless it be shewn, yet it will be otherwise in case such private law be recognized by a public one. *Ex. gr.* the 23 *H. 6. c. 9.* relative to sheriff's bonds is a private law, yet the 4 *Ann. c. 16. s. 20.* having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond. These are not like the cases of usurious and gaming securities, for there it does not appear upon the face of the declaration that they are

1788.

SAMUEL  
again?  
EVANS.(a) 1 *Lev.* 26.(b) 2 *Lev.* 103.(c) 3 *Lev.* 74.(d) *Dougl.* 90, 3.



1788.

SAMUEL  
against  
EVANS.

void; and therefore it is necessary to avoid them by pleading: but here it appears expressly upon the plaintiff's own shewing that the condition of the bond is repugnant and void; so that the assistance of the statute of *Anne*, if there had been any doubt, is not wanting upon this occasion. The bond is void *ab initio*; it need not be avoided by any matter *debors*; it appears to be void on the record. In the case of *Mills and Bond*, which is reported in *Strange* (a) and *Fortescue* (b), it appeared by the declaration in an action of debt on a bail bond that the original process was returnable at a day out of term; for the term ended on the *Friday*, and the condition was to appear on the *Saturday*; the defendant pleaded *nil debet*, to which the plaintiff demurred; and it was objected that the statute of *H. 6.* ought to have been pleaded: but the court held it not necessary, for the process itself was void; and the plaintiff had no cause of action on his own shewing. Now here the writ is alleged in the declaration to be returnable on the morrow of *All Souls*, which is a good return; but the condition is to appear on an impossible day, which is bad, according to the case of *Graham v. Crawshaw* (c). If so, the plea of *non est factum* was the proper one. This is a matter of substance, and not of form, and therefore cannot be amended. The condition is part of the substance. 10 *Rep.* 100. 37 *H. 6.* 1. If a *venire facias* issue returnable the day before the teste, that is not amendable after verdict. 1 *Rol. Abr.* 200. l. 41, 44. So a false date, or a misprision in it, shall not be amended. 1 *Lev.* 2. Lord *Pembroke v. Lord Jefferies*, 1 *Salk.* 53.

ASHHURST, J.—If all the cases on this subject were on one side, however apparently contrary to reason they might be, the court would be bound by them: but if there be several cases which are not reconcileable with reason on one side, and one sensible case to the contrary, we ought to decide according to the latter. Now there can be no doubt on the reason of the thing but that the statute 23 *Hen. 6.* is a general law; for though it is said to relate to officers of a certain description, yet all the king's subjects are included in it, for it gives to all of them a liberty of being bailed. And the case in *Strange* corroborating the opinion that this is a general law, we might determine it to be such independent of the statute of *Anne*: but whatever doubt there might have been before the passing of that statute, it is

(a) 1 vol. 399.

(b) 363.

(c) 3 *Lew.* 74.



now removed by that act, which unquestionably makes it a general law.

1788.

SAMUEL  
against  
EVANS.

BULLER, J.—It is astonishing that a doubt could ever have arisen whether the statute 23 *Hen. 6. c. 9.* was a general law or not: for it alludes to all arrests; and every person who may be arrested is within the provisions of it. Even if the statute of *Anne* had never passed, I should have had no difficulty in adopting the opinions of Lords Ch. J. *Rolle*, *Glynn*, and *Hale*, that this is a general law. *Twisden*, J. indeed decided otherwise, in the case cited at the bar; but it is clear from the language which he used on that occasion that he decided contrary to his own opinion. For he said (a) it had been settled some time before that the statute was only a private statute, of which the court could not take notice, unless it were pleaded; but if it were open to discussion, he thought that it ought to be ruled otherwise. It does not appear what case was determined between the two cases reported in 1 *Lev. 86.* and in 2 *Saunders*; but it must have passed without notice; yet whatever that case might have been, as there were the opinions of three Chief Justices, all eminent lawyers, the other way, I should have held myself justified in agreeing with those Judges that this was a general law, it being agreeable to reason, notwithstanding an intervening case which was against it. But the point is not now open to consideration; for whatever might have been the law before the statute of *Anne*, the case of *Saxby v. Kirkus* (b) removes all doubt: the court there said, though the 23 *Hen. 6. c. 9.* was a private law, yet the statute 4 and 5 *Anne* having enabled the sheriff to assign such bond, the court must take notice of the law that enables him to take such bond. If then we are bound to take notice of this statute, there can be no doubt in this case; for as to the manner of pleading, it is properly said in *Hobart* that the special matter must appear by some means or other upon the record; and if it be shewn on the declaration, it need not be pleaded. So if it appear on craving oyer of the bond, the defendant may demur without pleading the special matter. In short, it is sufficient if it appear upon any part of the record. Then it has been said that the condition may be rejected, and that the bond may be good as a single bill; but a single bill would not answer the purpose; the bond is directed by the statute to be conditioned for the appearance of the defendant at the

(a) 2 *Saund.* 155.(b) *Bull. N. P.* 224.



1788.

SAMUEL  
against  
EVANS.

return of the writ: now here it is impossible that any appearance according to the condition of the bond could answer the purposes of the writ. If the party had appeared on the morrow of *All Souls*, it would not have been a substantial compliance with the condition; for there is a difference between proceedings by bill and those by original; in the former, the judgment relates to the first day of term only, of which day the appearance ought to be; but in the latter, it relates to the return of the term, and therefore the appearance should be as of that day.

GROSE, J.—of the same opinion.

Rule absolute.

Saturday,  
May 31st.

HENDERSON against WITHEY and Another.

To a plea of *scire facias* against bail, that the principal died before the return of any *ca. sa.* a replication stating a particular *ca. sa.* and that the principal was alive at the return of that *ca. sa.* must conclude with an averment.

THIS was a *scire facias* upon a recognizance against the defendants as bail of O'Bryen. Plea, that before the issuing of the *scire facias*, and before the return of any *ca. sa.* against the principal, he died, to wit, on the 2d of January 1788. Replication, that after the recovery of the judgment against O'Bryen, and before the suing forth of the *scire facias*, to wit, on the 28th of November 1787, the plaintiff sued out a *ca. sa.* against O'Bryen, to which the sheriff returned *non est inventus*; and that at the return of the *ca. sa.* to wit, on the 23d of January 1788, O'Bryen was living, and this he is ready to verify. To this there was a special demurrer, because the replication concluded with a verification, whereas it ought to have concluded to the country. Joinder in demurrer.

The Court (a), being clearly of opinion that this point had been expressly determined in *Filewood v. Popplewell* (b), and *Candler v. Roberts* (c), gave judgment for the plaintiff, without hearing any argument. And Buller, J. said, The *ca. sa.* in the replication is new matter; and by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it.

Gibbs for the plaintiff. Wood for the defendant.

Judgment for the plaintiff.

(a) *Abbott*, J. was not in court this day.

(b) 2 *Wils.* 65.

(c) *Dougl.* 58.



1788.

The KING *against* The Inhabitants of LOPEN.Saturday,  
May 31st.

**J**OHN GIFFORD and his four brothers, children of *Thomas Gifford*, lately deceased, were removed from *South Petherton* to *Lopen*, both in the county of *Somerset*. On appeal the Sessions confirmed that order, subject to the opinion of this court on the following case. *Samuel Daniel*, the grandfather of *Susanna* wife of *Thomas Gifford*, and great grandfather of the present paupers, being seised for the term of his own life of a copyhold estate at *South Petherton*, as recited in the bond annexed, which said premises were subject by the custom of the manor to a widow's free bench, married *Mary Tucker*, who previous to the marriage entered into the said bond. About five years afterwards *Samuel Daniel* died, leaving the said *Mary* his widow, who gave up the possession of the said premises to *Thomas Gifford* and his wife *Susanna*, who were at that time parishioners legally settled in the parish of *Lopen*, according to the stipulations contained in the said bond, who continued therein until the time of their deaths. *Thomas Gifford*, who survived *Susanna*, and who died in the year 1784, by his will devised the said premises to trustees to be sold for the payment of his debts, and to divide the surplus amongst his children the present paupers. The premises were afterwards sold according to the directions and for the purposes mentioned in the will. *Mary Daniel* is still living and a widow. The bond, referred to in the case, was given by *Mary Tucker* to *Thomas Gifford* in 100 l. in the year 1768. The condition recited that *Samuel Daniel* was seised of and interested in the premises in question for his life, according to the custom of the manor; it recited the intended marriage between *Samuel Daniel* and *Mary Tucker*; and that *Mary Tucker*, in case the marriage took effect, and she happened to survive *Samuel Daniel* (he dying seised of the premises) would be entitled to her free bench; and that *Mary Tucker* had agreed, in case she should become entitled, that she would permit and suffer *Thomas Gifford* and *Susanna* his wife (grand-daughter of *Samuel Daniel*) their executors, &c. to hold and enjoy, and for their own benefit to receive and take, the rents, issues, and profits of all the said copyhold premises (except the west end of the dwelling-house, consisting of two ground rooms and one

Where a woman on her marriage with a copyholder of a manor, where the widows of husbands dying seised are entitled to their free bench, gave a bond that the son of her intended husband by a former wife should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and after the death of the husband the widow delivered up the possession to the son according to the bond, he gained a settlement by residence on it for 40 days.



1788.

The King  
against  
The Inhabi-  
tants of  
LOPEN.

chamber over the same, which *Mary Tucker* reserved to her own use, and also except 32 gallons of cyder to be made at the expence of *Thomas Gifford* and *Susanna* his wife yearly of the fruit growing in the orchard, and in case of failure of apples sufficient for that purpose in any one year, then except one full hoghead of cyder in the succeeding year for the use and benefit of *Mary Tucker*, as long as she remained a widow; provided that the said *Thomas Gifford* and *Susanna* his wife, their executors, &c. did and should from time to time, when and as often as occasion should require, repair the roof of the west end of the dwelling-house, and keep the same end habitable by the said *Mary Tucker*, and also within one month next after the death of her said intended husband furnish her with a bedstead, one table, and an iron pot; and that the said *Mary Tucker* had also agreed, that, in case she should marry again, whereby the said *Thomas Gifford* and *Susanna* his wife would be deprived of the premises and of all interest therein, she the said *Mary Tucker* would pay unto *Thomas Gifford*, his executors, &c. the sum of 60 l. within one month next after such second marriage. And the bond was conditioned for the performance of these articles.

A rule having been obtained to shew cause why the order of sessions should not be quashed;

*Lens* now shewed cause, and contended, that, under the circumstances of this case, no interest in the premises passed to *Thomas Gifford*; the only interest which he took was under the bond, the penalty of which he would have been entitled to recover upon a breach of the condition. In the first place, *Mary Tucker* was not seised of the estate at the time she gave the bond: and secondly, she had no consideration for giving it. First, not being seised of the estate at the time of executing the bond, she could not convey it. In *Yelverton v. Yelverton* (a) the father covenanted, in consideration of natural affection, to stand seised of all his lands which he had, and which he afterwards should purchase, to the use of himself for life, and afterwards to his youngest son and his heirs; afterwards he purchased land and died; and the question was, whether the youngest son should take under this covenant: and the court held that it was not sufficient to vest any use in him of the land; for a man cannot by a covenant raise an use out of land which

(a) *Cro. Eliz.* 401.



he hath not. Therefore the bond in question cannot be considered to be a covenant to stand seised to uses. Secondly, there was no consideration to the party to enter into it. A consideration of blood has indeed been held to be sufficient; but between these parties there was no such consideration; for *Susanna Gifford*, in whose favour the bond was made, was not her child, but that of her intended husband by a former wife. And besides she thereby relinquished an interest which she would otherwise have been entitled to without any equivalent. The principal difficulty seems to be that, after the death of the grandfather, his widow, being then entitled to her free bench, permitted the father and mother of the paupers to enter into possession: but it cannot be contended from such a permission to reside on the estate that they had any interest in it; no conveyance was or could be made of it by the widow to them; they were merely tenants at will. After the cases of *R. v. St. Michael in Bath* (a), and *R. v. Wivelingham* (b), it cannot be contended, that an equitable interest in land is not sufficient to give a settlement to the party residing upon it: but those cases apply only where the party, having the equitable interest, might by filing a bill in equity obtain a legal title. But if it be doubtful whether the occupier would be entitled in equity to a conveyance of the legal title, that is a sufficient reason why this court should not in this collateral manner decide a question of this nature. Now in the present case, sufficient matter appears in the case to raise a doubt whether the party, in whose favour the bond was made, could have compelled a specific performance in a court of equity. It has been determined in many cases in chancery, that the court will not compel a performance of an agreement to convey without any consideration. Such were the cases of *Osgood v. Strode* (c), and *Fursaker v. Robinson* (d). In the former case the party had no other remedy: but there would have been a stronger reason in the present case to induce a court of equity to refuse any assistance, because the party had another remedy; he might have sued for the penalty of the bond. And in the case of *Bagg v. Foster* (e), the court of chancery refused to convert the condition of a bond into an agreement and carry it into execution by decreeing a conveyance of the land. It is no answer to the want of title in the father and mother of the paupers to say,

1788.

The King  
against  
The Inhabitants of  
LOPEN.

(a) *Cald.* 110.(b) *Cald.* 121.(c) 2 *P. Wms.* 245.(d) *Proc. in Ch.* 475.(e) 1 *Ch. Cas.* 188.

that



1788.

The King  
against  
The Inhabi-  
tants of  
LOPEN.

that they might have maintained the possession against an ejectment brought by the widow, because the plaintiff in ejectment must recover on the strength of his own title; and perhaps the widow would have been precluded by her own deed; but that does not give a better title to the paupers' father and mother, who must be considered in law as mere tenants at will. And their residence upon this estate, which is not stated to be worth 10 *l. per annum*, gave them no settlement.

*Bearcroft, Franklyn, and Ford, contra*, were stopped by the court.

BULLER, J.—The first question is, whether this is a voluntary bond: as to which, it is sufficient to say, that it was made in consideration of marriage. Therefore it was not a voluntary bond; and it will bind all parties concerned in it. The person whom the obligor married was seised of this estate, and might have disposed of it in his lifetime as he pleased. The bond was executed by the widow in consideration of marriage; she has reserved to herself a benefit by it; for the part of the house in which she was to reside, was to be kept in repair for her; the father and mother of the paupers were to provide her with furniture; and they were to make a certain quantity of cyder for her annually; therefore she must be bound by it. The next point to be considered is, whether in this case a court of equity would have decreed a specific performance; and if not, what effect this instrument would have had. It is very much in the discretion of a court of equity, whether they will compel a specific performance or not: if the contract be unreasonable or unequal, they will not assist the party seeking relief, but cause him to pursue his remedy at law. But this is an instrument obligatory at law; and therefore it is unnecessary to consider whether a court of equity would or would not have decreed a specific performance of the contract; though I see no reason why they would not have ordered it to be carried into execution. It is material too to consider that in this case the husband might have defeated the widow's claim, if he had chosen: for if he did not die seised, she would not have been entitled to her free bench. Then we must take it that he held the estate till his death on the faith that the widow would afterwards deliver up the possession to the father and mother of the paupers. Therefore under these circumstances the parties to be benefited by the bond would be entitled to a specific performance of the contract.

But



IN THE TWENTY-EIGHTH YEAR OF GEORGE III.

But there is another circumstance in the case still more decisive; the widow herself was so satisfied that she was bound by the bond, that on the death of her husband she actually delivered up the possession according to her contract: and from that time till the year 1768 the paupers' father continued in possession under the idea that he was entitled under the bond. This man then so in possession had a good title against all the world but the widow; nay the widow herself was so far bound by the bond, that she could not have recovered in ejectment. So that he had not only an equitable title; but he had also the possession; and no person could have recovered the estate from him.

GROSE, J. declared himself of the same opinion.

Rule absolute.

The KING *against* THOMAS MASON.

Saturday,  
June 1st.

THE jurors for our sovereign lord the king upon their oath present that *Thomas Mason*, late of, &c. being an evil disposed person, and not minding to gain his livelihood by truth and honest labour, but going about daily contriving to defraud the honest subjects of our lord the king of their honest monies, goods, wares, and merchandizes, for supporting his profligate way of life, on the 13th day of *June* in the 27th year, &c. with force and arms, at the parish aforesaid, in the county aforesaid unlawfully, knowingly, and designedly, did obtain from one *Robert Scofield*, divers sums of money, that is to say, the sum of two guineas, of the value of two pounds and two shillings of lawful money of *Great Britain*, of the proper monies of the said *Robert Scofield* by false pretences, with an intent then and there to cheat and defraud the said *Robert Scofield* of the same. And the jurors, &c. do further present that the said *Thomas Mason*, on the 21st day of *July*, in the 27th year, &c. with force and arms, at, &c. unlawfully, knowingly, and designedly, did obtain from the said *Robert Scofield* the sum of four pounds fourteen shillings and six-pence of lawful money of *Great Britain*, of the proper monies of the said *Robert Scofield*, with intent then and there to defraud the said *Robert Scofield* of the same; to the great damage of the said *Robert Scofield*; to the evil example of all others in the like case offending; against the peace of our said lord the king, his crown and dignity; and against the form of the statute in such case made and provided.

An indictment charging the defendant with obtaining money by false pretences is insufficient, if it does not shew what the false pretences were; and if the defendant be convicted on it, the court will reverse the judgment, upon a writ of error.



1783.

The KING  
against  
MASON.

The defendant pleaded not guilty; and on his trial at the quarter-sessions at *Worcester*, he was convicted, and received sentence of transportation for seven years.

The defendant brought a writ of error, and assigned for error that it does not appear by the said indictment what the particular and specific false pretences were, by which it is alleged in the first count of the said indictment that the said *Thomas Mason* did obtain from the said *Robert Scofield* divers sums of money, of the proper monies of the said *Robert Scofield* with an intent to cheat and defraud the said *Robert Scofield* of the same; and that it does not appear by the said indictment by what particular means or pretences, or on what particular account, the said *Thomas Mason* did obtain from the said *Robert Scofield* the said sum of four pounds fourteen shillings and sixpence, of the proper monies of the said *Robert Scofield*, which it is alleged in the second count of the said indictment that the said *Thomas Mason* did obtain from the said *Robert Scofield*, with intent to defraud the said *Robert Scofield* of the same; and that the judgment aforesaid is given that the said *Thomas Mason* be transported beyond the seas for and during the term of seven years, according to the form and effect of the statutes in that case made and provided; whereas by the law of the land judgment ought to have been given in the premises aforesaid for the said *Thomas Mason*; and that he should go thereof quit without day.

*Marryatt*, for the defendant, after observing that the second count was manifestly defective, inasmuch as it did not contain a charge of any crime either against the common, or statute, law, made three objections to the first count; 1st, That the offence imputed to the defendant is not specified with sufficient particularity; 2dly, That the charge is repugnant; and 3dly, That this count does not conclude either against the peace, or against the form of the statute. As to the first: without having recourse to Lord *Coke's* definition of *certainty* as required in law proceedings, it is sufficient to refer to that rule which *De Grey* Ch. J. laid down in *R. v. Horne* (a); "The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of "guilty" or "not guilty" upon the premises delivered to them; and that the court may see such a definite crime, that they may

(a) *Corp.* 682.

apply



apply the punishment which the law prescribes:" after which he said "As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed, those circumstances must be set out." Now this count does not specify the sort of pretence by which the money is supposed to have been obtained: the pretence is of the very essence of the crime, and constitutes the offence. The defendant therefore should have had notice of this, in order to prepare for his defence; and if the pretence had been stated, he might have been enabled to have proved that he never made such a misrepresentation as was imputed to him. Besides it is the usual form of the precedents of indictments to state the pretence. Nay, in civil actions a declaration, stating that the defendant by *divers false pretences* and misrepresentations had occasioned an injury to the plaintiff, or had deprived him of a sum of money, would be adjudged insufficient. So would a declaration in *assumpsit*, stating that the defendant was indebted to the plaintiff for divers sums of money, for divers valuable considerations. Then if this objection would vitiate a declaration, *à fortiori* will it apply to an indictment, where greater certainty is required. And it is the more necessary in such an indictment as the present, because it has been held in several determinations that various kinds of pretences are insufficient. It cannot be objected that all the cases which have been determined on objections of this nature are previous to the statute 30 Geo. 2., for in *R. v. Wheatley*, 2 Burr. 1127. 1 Geo. 3. where *the defendant* had been convicted of selling malt liquor by short measure, the judgment was arrested. In *R. v. Munoz (a)*, where the defendant had been convicted for procuring a promissory note by *false tokens* under the statute 33 Hen. 8. c. 1., the judgment was arrested because the indictment did not specify the false tokens: So here *false pretences* are equally uncertain. So in *R. v. Sparling (b)*, and *R. v. Popplewell (c)*, the convictions on the 6 & 7 W. 3. c. 11. were quashed because the oaths and curses, for which the defendants were convicted, were not set forth. An indictment was also quashed, as being too general, charging that the defendant "*malè et negligenter se gessit* in execution of the office of constable (d). So in rescue, it is necessary to state for what offence the party was in custody. It is no answer in this case to say that the indictment pursues the words of the statute;

(a) 2 Str. 1127.

(b) 1 Str. 497.

(c) Stra. 686.

(d) 1 Str. 2.

for

1788.

The KING  
against  
MASON.



1788.

The KING  
against  
MASON.

for that answer was attempted to be given in *Davy v. Baker* (a), but it was over-ruled: that was on an action on the statute 2 Geo. 2. c. 24. for preventing bribery at the election of members of parliament; the judgment was arrested, because the declaration only stated that the defendant did receive a gift or reward, without specifying *what* he received as a reward. 2dly, this count is repugnant; for it states that the defendant obtained from the prosecutor *divers sums* of money, to wit, *the sum* of two guineas: that sum alone is repugnant to *divers sums*; and if it be rejected as surplusage, it is equally fatal, because then it does not specify what sums he did obtain. And if this count were to be adjudged sufficient, without particularising either the sums which the defendant obtained, or the pretences by which he obtained them, it would be equally sufficient to state that he had obtained *divers goods*, without specifying what those goods were. 3dly, This count does not conclude either against the peace, or against the form of the statute. The former of these is a sufficient objection to this count. And it is equally necessary that every indictment on a statute should conclude *contra formam statuti*: here the judgment of transportation is a punishment not known to the common law, and therefore, if warranted at all, must be so by statute. But it is said in 2 Hawk. P. C. c. 25. §. 116. "That a judgment by statute shall never be given on an indictment at common law, as every indictment, which does not conclude *contra formam statuti*, shall be taken to be. And therefore if an indictment do not conclude *contra formam statuti*, and the offence indicted be only prohibited by statute and not by common law, it is wholly insufficient, and no judgment at all can be given upon it." It is to be observed that this is not an application to quash an indictment, which depends on the discretion of the court; but this indictment comes before the court on a writ of error; and if the court see that the indictment is defective they are bound to reverse the judgment (b).

*Caldecott, contra.* In answer to the objection, that the charge in the first count is too general and uncertain, because it does not give the defendant sufficient notice to prepare his defence; it cannot be denied that the use of this general form of indictment is in many instances established law; as in those of a common scold, where it is not necessary to specify any instance. So in charging the offence of keeping a bawdy-house, it is said in

(a) 4 Burr. 2471.

(b) 2 Burr. 1127.



*Hawkins* (a) that it is needless to set forth any circumstances. The like for keeping a gaming-house, or for conspiracies. So in all cases of barratry; and *Hawkins* says (b) "it is enough to charge that the defendant is a common barrator, without shewing any of the particular facts; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the common peace, all of which it would be too prolix to enumerate in the indictment." If then in a crime so defined it is only necessary to state in the indictment that the defendant is a barrator, where the modes in which a person may illegally move and promote suits are certainly infinite, it is equally unnecessary in the present instance to state more than that the defendant obtained the money by false pretences; for upon the principle of notice, it is in itself much more likely that a defendant should know the particular acts of fraud and deceit which he has practised against the prosecutor, which is the present case, than where the prosecutor is at liberty to range through the transactions of a defendant's whole life, which is the case in a charge of barratry. It is admitted that all the cases cited were before the 30 Geo. 2. c. 24. except that of *R. v. Wheatley* (c); and that case was determined on the ground that it was not an indictable offence. Besides, this general form of indictment on this statute has obtained so long in practice, that it ought to be considered as established law. And it has been held by this court in many cases, and particularly in those on the game laws, that printed forms, such as those in *Burn* (d), shew the general sense and understanding of the profession. This form of indictment is continued in the latest edition of *The Crown Circuit Companion*, which, though not a book of authority, affords historical evidence of the use of this form at *The Old Bailey*; and in point of fact it is well known that many persons have been transported for this offence under this form of indictment. At all events there is no ground for the objection in this indictment; for it states the sums of money of which the prosecutor was defrauded, and the times when the fraud was committed. To this it is objected that the charge is repugnant; because it is stated that the defendant obtained *divers sums* of money, that is to say, *the sum* of two guineas. But it is sufficient if one charge be stated under the *videlicet*. With respect

1788.

The KING  
against  
MASON.

(a) 2 Hawk. P. C. c. 25. f. 57.

(b) 2 Hawk. P. C. c. 25. f. 59.

(c) 2 Burr. 1125.

(d) Ante, 1 vol. 50, 51.—2 vol. 23, 24.



1788.

The KING.  
against  
MASON.

to the second count, it is good as charging the defendant with an offence at common law, namely, for cheating.

*Marryatt*, in reply, was stopped by the court.

BULLER, J.—Several objections have been made on the part of the defendant; but the material one, on which I found my judgment, is that the indictment does not state what the false pretences were. The question is not a new one; for I remember a case when I was at the bar, though the name of it does not occur to me now, and I argued it on the analogy to the case in *Strange* for obtaining a note by false tokens, which entirely governs this. That was a case on the statute 33 *Hen. 8. c. 1.* which makes it an offence to obtain money or goods by false tokens. The statute 30 *Geo. 2. c. 24.* only enlarges the description of the offence in the statute of *Hen. 8.* Both statutes are made in *pari materia*; and whatever has been determined in the construction of one of them is a sound rule of construction for the other. The judgment was arrested in the case in *Strange*, because the indictment did not specify the *false tokens*; then by the same reason an indictment on the 30 *Geo. 2. c. 24.* which speaks of *false pretences*, must state what the false pretences are, otherwise the indictment is bad; there is no distinction between the two cases; the same objection which held in the one must also prevail in the other. With respect to the form of the indictment; I am clear that the precedents have not been universally in the same form as the prosecutor's counsel has stated, for it was otherwise in the first indictment on this statute which I ever tried; the indictment did state what the false pretences were. The other objections seem to have great weight in them; but it is not necessary to consider them in this case, because I am of opinion that the first objection is fatal, and that the judgment must be reversed.

GROSE, J.—I am of opinion, with my brother *Buller*, that the objection, that the pretences are not specified, is decisive, and for the reasons mentioned by the defendant's counsel; that the defendant may know what he is to defend, and the court may see what punishment they are to inflict. These reasons apply to all offences. The cases, mentioned at the bar, of a scold, of barratry, and keeping a gaming-house, differ materially from this; they consist of several facts; this of a single one. This is a charge for a precise crime, and therefore it must be alleged. With respect to any practice to the contrary, founded on any  
faulty



faulty precedent, if such a practice has prevailed, it is time that it should be rectified. But such practice cannot always have obtained, for I recollect having tried several defendants on indictments which stated what the false pretences were. Therefore, without going further into the case, I am clearly of opinion that the indictment cannot be supported.

*The Court* reversed the judgment, and ordered that the defendant should be set at liberty.

1788.

The KING  
against  
MASON.

EDWARDS *against* HARBEN, Executor of TEMPEST  
MERCER.

Saturday,  
May 31st.

**A**SSUMPSIT for goods sold to the defendant's testator. The defendant pleaded that he was not executor, nor had ever administered as such; and, secondly, that he had fully administered, &c. Replication, that he had administered divers goods &c. of the testator; and issue thereon. And to the second plea, that the defendant, at the time of exhibiting the plaintiff's bill, had, and still has, goods and chattels of the deceased in his hands sufficient to satisfy the plaintiff's demands; and issue thereon. At the trial at the last Assizes at *East-Grinstead, Sussex*, a verdict was found for the plaintiff with 22*l.* 18*s.* 6*d.* damages and 40*s.* costs, subject to the opinion of this court on the following case. *William Tempest Mercer* in his life-time, and before the time of the execution of the bill of sale herein-after mentioned, was indebted to the plaintiff in the sum of 22*l.* 18*s.* 6*d.* for goods sold and delivered, which sum still remains due to the plaintiff. *William Tempest Mercer*, at the time of the execution of the said bill of sale, was likewise indebted to the defendant in the sum of 191*l.* for money lent. On the 27th of *March* 1786 *Tempest Mercer* offered to the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at *Lewes*, by way of security for the said debt. The defendant refused to accept of the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the money should not be sooner paid; to which *Tempest Mercer*

If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued as executor *de son tort* for the debts of the deceased; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors.

It is a general rule in the transfer of chattels that the possession must accom-

pany and follow the deed.—Therefore, where the conveyance is absolute, the possession must be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed.

agreed,



1788.

EDWARDS  
against  
HARBEN.

agreed, and accordingly on the same day executed a bill of sale in the common form, by which *Mercer* bargained and sold to the defendant for ever his household furniture, medicines, stock in trade [particularly specifying them], and *all and every other the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at Lewes*. Immediately upon the execution of the bill of sale possession was delivered to the defendant in the manner described therein, *viz.* by the delivery of one cork screw in the name of the whole, but in no other manner whatsoever. All the effects described in the bill of sale remained in the possession of *William Tempest Mercer* until the time of his death, which happened on the 7th of *April* 1786. On the 8th of *April* 1786, being before the expiration of fourteen days from the execution of the bill of sale, the defendant entered and took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same for 236*l.* 7*s.* 5*d.* *William Tempest Mercer* died intestate, and no letters of administration were taken out to the deceased by the defendant, or by any other person, before the commencement of this action. The question for the opinion of the court is, whether the defendant is entitled to retain the produce of the said effects, or at least the value of 191*l.*, the consideration of the bill of sale: or whether the bill of sale is void as against the creditors of *William Tempest Mercer*; and the plaintiff in this action is entitled to recover his debt of 22*l.* 18*s.* 6*d.* against the defendant, as executor *de son tort*.

*Partington*, for the plaintiff, contended that the bill of sale mentioned in the case was fraudulent against the creditors of the deceased, and was void under 13 *Eliz. c. 5.*; and that, consequently, the defendant must be considered as an executor *de son tort*, in which case he could not retain for any debt of his own; *Cro. Jac.* 271. *Yelv.* 196. This bill of sale is void under the 13 *Eliz. c. 5.* because it was not attended with any mark of possession notorious to the rest of the world; but the vendor by agreement with the vendee, which constituted a part of the original transaction, continued in the possession and disposition of the goods mentioned in the bill of sale until his death. In considering this question the two following principles may be supported; 1<sup>st</sup>, Whenever the vendor is found in the actual possession of goods which he has sold, such continuance in possession is *prima facie* evidence of an intent to delay, hinder, or defraud creditors, and



1788.

EDWARDS  
against  
HARBEN.

and throws it on the other party to rebut it by shewing that the continuance in possession was with some other view. 2dly, Whenever there is a positive agreement between the parties that the vendor shall be permitted after the sale to have, for any space of time, not only the mere manual occupation, but also the disposition, of the goods sold, to trade with them as his own, it is an actual fraud on the other creditors of the vendor. As to the first; every man is supposed to intend the natural and probable consequences of his own acts, unless it can be shewn from circumstances that he acted upon some other motives. This applies not only to civil, but also to criminal, cases. For if a man does any act, which in its consequences tends to destroy the life of another, and death ensues, he must be convicted of murder, unless he can shew that he had no intention to commit that crime. So if a person speak or publish something in writing concerning another, which in its nature tends to defamation, he will be punished for publishing slander or a libel, unless he can shew that he had no intention to defame, but acted on proper motives, such as that he had been the master of the prosecutor and was giving his character as a servant. Now in a case like the present, the natural and probable consequences of suffering another to continue in the possession of property not his own is to hinder, delay, and defraud, creditors of their just debts, by giving him false credit, and inducing them by the appearance of property to delay taking the necessary means to recover their demands. Visible possession is the only criterion of personal property. It is not like the possession of lands, where a delivery of the deeds is the notorious transfer of possession; or like a ship at sea, where no actual possession can be taken, and where, for that reason, a delivery of the grand bill of sale is considered as a delivery of the ship (a). And therefore the mere possession of a ship does not give the possessor a credit like the possession of other goods, because a purchaser or mortgagee of a ship enquires for the grand bill of sale. Now this being the natural consequence of the vendor's continuance in possession, it is conclusive in this case, because no contrary intention is shewn. Secondly, the bill of sale delivered under the circumstances of this case is an actual fraud upon the vendor's creditors. For here the false credit is not only the natural and probable, but the unavoidable,

(a) *Vide Atkinson v. Maling*, ante 462.



1788.

EDWARDS  
against  
HARBEN.

consequence of the deliberate act of the parties; an act incapable of explanation from any other motive than that of imposing on creditors. It is a stipulation from which neither party can draw a fair advantage. Either the vendor must be considered in the intermediate time as a trustee for the vendee, or that he is empowered to trade with the vendee's property for his own benefit. If the former, he receives no personal benefit from the stipulation; if the latter, it necessarily implies that the sale was not real, or that the consideration was not adequate; otherwise the vendee would not risk his property and give up part of his purchase for nothing. But if the parties be considered as acting with a view to impose upon the creditors of the vendor, the conduct of both is reconcilable: the vendor is desirous of holding out a false credit; the vendee is willing to assist him in the design, provided he can secure himself from the other creditors; and therefore they form this species of contrivance; "If you will put me in a situation to be safe against your other creditors, I will leave you in that which shall induce them not to attack you. You shall preserve the credit from having possession; I will retain the security from the real ownership. Give me the command of the property, you shall have it to hold out to the world and your creditors as your own." This is a collusion between them to defraud the creditors of the vendor: it is an advantage stipulated for by the vendor, and allowed by the vendee at the expence, not of himself, but of the creditors. The consequences of giving effect to conveyances of this kind are dangerous in the extreme; it enables a debtor to withdraw his person or effects before his creditors can take the alarm; and may perhaps prevent their ever taking any effectual steps to recover their demands. Apparent personal property is the principal foundation of general credit. It is material therefore, when a person is reduced to part with this kind of property, especially such as is considered either as objects of personal accommodation, or as instruments of trade, that his creditors should be aware of his situation. A contrivance to conceal it is an attempt to deceive them; therefore such a transfer with an intent to preserve the same appearance to the world as before, accompanied with a stipulation answering that and no other purpose, is a conveyance with an intent to deceive, defraud, and delay creditors, because it is to leave a party in a state of apparent credit under circumstances which, if known, would shew him not to be entitled to it.



it, and give creditors notice what steps they ought to take. The leading case on this subject is *Twyne's case* (a), in which the vendor's continuing in possession seems to have been considered as the principal mark of fraud: and Lord Coke subjoins his opinion and advice to purchasers, "immediately after the gift, take the possession of them; for continuance of the possession in the donor is a sign of trust." This was directly confirmed by Lord Coke's opinion in *Stone v. Grubham* (b), and by the reasoning of Burnet, J. in *Ryall v. Roll* (c). Therefore in this case the agreement, which was part of the original transaction, that the vendor should continue in possession for a certain time after the execution of the bill of sale, vacates it under the statute 13 Eliz. c. 5. This cannot be considered to be only an indulgence to the vendor, because it was an express stipulation in the original agreement, which the law will not allow, it being at the expence of the other creditors. Neither can the conveyance be good as a mortgage with condition that the possession was not to be taken until forfeited; for the case of *Ryall v. Roll* decides that a mortgage of goods without possession cannot exist in point of law. If it did, no person who intended to secure himself would take it; for if the mortgagor were to have the possession till forfeited, he might dissipate the whole property and render the security ineffectual. His advantage is only in proportion to the danger of the security. His profit is to arise from the disposal of the old stock, and the stock which replaces the fluctuation is no part of the mortgagee's security. This is not like the case of a mortgage of land, or fixed property, where the principal remains untouched, and produces an annual profit. But even if the vendor had delivered up the possession, still the bill of sale must be considered as fraudulent. The transaction on the face of the deed is an absolute sale, in which case if the possession had been delivered, the vendor could not have taken the surplus; that would defraud the rest of the creditors: but the real agreement made it a security voidable on payment of 191*l.* within fourteen days; and after that time the vendee had only a power to enter and sell the security, which consequently raised an implied trust as to the residue for the vendor. Thus the vendor reserved something out of the property in his own favour, which his creditors would not have known, and consequently it was a fraud on them. And this presumption is

(a) 3 Co. 80. (b) 2 Bull. 218. (c) 1 Atk. 168. 1 Ves. 348. S. C.



1788.

EDWARDS  
against  
HARBEN.

strengthened by the circumstance of there not having been any valuation or appraisement of the goods at the time, which shews that the transfer was not meant to be a real one. There is also another light in which this bill of sale must be considered to be void. It is a general conveyance by a trader, out of the regular course of trade, of an uncertain property, partly consisting of stock in trade, for the purpose of satisfying a particular creditor, and that to such an extent as would prevent his carrying on any future trade after actual possession was taken, and would consequently take away his only means of satisfying his other creditors. There is indeed an inventory annexed to the bill of sale, but it is followed by a general sweeping clause of *all property and stock in trade which shall be in the house*. This defeats the particular enumeration; and to allow the circumstance of an inventory of part of the goods to take away the general rule, would be to destroy the rule itself, because such an inventory might always be added. This makes the bill of sale void on the principle on which cases of bankruptcy have been determined. The cases on that subject have gone the length of determining that a conveyance made by a trader of his property, which, by its consequences, disables him from carrying on his business, whether made with a view to satisfy a present, or indemnify a future, creditor, or for what purpose soever, is *ipso facto* void against creditors, because it destroys all means of satisfying those creditors. *Hooper v. Smith*, 1 Bl. Rep. 442. *Law v. Skinner*, 2 Bl. Rep. 996. *Hassels v. Simpson*, Dougl. 86. n. 39. Now if such a conveyance be void as against creditors, it is on the ground of fraud; and therefore this bill of sale must on that principle also be determined to be fraudulent and void.

But even supposing the deed not to be void, still the defendant acted improperly in taking possession before the time stipulated between the parties. [The court told the plaintiff's counsel he need not go into that point.]

*Steele* for the defendant. If the court decide that this assignment was void, it will in effect determine that all bills of sale of property, where possession is not immediately delivered, are fraudulent and void under the statute 13 Eliz. c. 5.; because it is stated in the case that this was given for a debt really due. But no case has ever yet determined that the mere want of possession alone is sufficient to make the assignment fraudulent and void;



1788.

EDWARDS  
against  
HARBEN.

void; and that statute could never have been intended to extend to a case like the present, for there is a proviso in it to protect conveyances for good and *bonâ fide* considerations. The want of possession is indeed *primâ facie* evidence of fraud, and it is mentioned in *Twyne's* case: but there it is only given as one among six reasons. In that case an action had actually been brought, and it plainly appeared that the assignment was given for the mere purpose of defeating a creditor who was pursuing his right of action, and who had recovered a judgment at the time when the bill of sale was executed. Almost all the other cases on this subject were determined on the bankrupt laws: the question in those cases is, whether the assignment amounted to an act of bankruptcy, which is extremely different from the question whether a deed be void as against creditors in other cases. Such an assignment as the present might perhaps be deemed fraudulent within the bankrupt laws, so as to enable the commissioners to sell the property, thus assigned, but remaining in the hands of the bankrupt, for the benefit of the creditors; but that power is expressly given by the 21 Jac. 1. c. 19. s. 11. This shews that without such a clause the mere circumstance of the bankrupt's continuing in possession would not have avoided the conveyance, or enabled the commissioners to sell even in those cases: but that statute does not apply to the present case, nor avoid any *bonâ fide* conveyance, merely because no notice is given to creditors, but in the case of bankruptcy. With respect to the transaction in this case; it has been said that the bill of sale must be considered as void, because the vendor was to continue in possession fourteen days; but so far from there being any intention of fraud, it is expressly stated in the case that the defendant refused to accept the bill of sale, unless he should be permitted to take possession immediately after the expiration of the fourteen days in case the money were not paid. This stipulation therefore proceeding from the vendee removes every suspicion of fraud, and accounts for the want of immediate possession. But even if the court should be of opinion that this deed was fraudulent, as against creditors, in the life-time of the grantor, yet this action cannot be maintained against the defendant as executor *de son tort*, because it is impossible to say on this case that the defendant intermeddled with the intestate's goods. At any rate the bill of sale was good as between the vendor and the vendee; the property of the goods passed immediately to the



1788.

EDWARDS  
against  
HARBEN.

vendee, the bill of sale being delivered to the vendee himself; and though it was agreed that he should not take possession for fourteen days, yet that condition cannot affect the immediate property which passed by the deed itself. *Co. Lit.* 36. a. Then if the property passed by the delivery of the bill of sale, the vendee cannot be considered to have intermeddled with the intestate's goods by taking possession of his own property. Even supposing that the property in the goods did not pass to the defendant by the bill of sale, still no action can be maintained against him as executor *de son tort*, because he claimed a right to the goods; though trespass might be brought against him by the rightful executor.

*Partington* in reply was stopped by the court.

BULLER, J. This is an action brought by the plaintiff, who is a creditor of *Mercer*, against the defendant as executor. It does not appear by the case that any other goods than those mentioned in the bill of sale came to the defendant's hands. The bill of sale is dated on the 27th *March* 1786, and is a general bill of sale of all the defendant's household furniture and stock in trade. This bill of sale is to take effect immediately on the face of it: but there was an agreement between *Mercer* and the defendant, that the goods should not be sold till the expiration of fourteen days from the date of its execution; and no possession was actually taken till after the death of *Mercer*, which happened within the fourteen days: but there was a formal delivery of a cork-screw in the name of the whole. On this case two questions arise; First, whether this bill of sale be void or not; and Secondly, if void, whether the defendant by having taken these goods under the bill of sale, made himself liable as an executor *de son tort*. The first question came before the court in the last term in the case of *Bamford v. Baron* (a), on a motion for

(a) *Bamford v. Baron* and Others.

Saturday, May 3d.

This cause was tried before Mr. Baron *Perry* at the last Assizes at *Leicester*, when a verdict was found for the defendants.

*Scott* moved for a new trial in *Easter Term* last, and stated that this was an action of trover, brought by the late sheriff for the county against the defendants, who had seized the goods in question, which formerly belonged to *Hayes*, after they had been

taken in execution at the suit of a creditor in *April* 1787, to whom the sheriff had paid the value. The defendants set up two answers; 1st, an assignment dated 16th *August* 1786, by *Hayes*, to two persons for the benefit of such of his creditors as would sign a deed of compromise by a certain time; notice whereof had been published in the country papers. The answer given by the plaintiff to this was, that it was agreed that *Hayes* should continue in possession till *May* 1787, he



1788.

EDWARDS  
against  
HARBEN.

for a new trial from the Northern circuit: and after hearing that case argued, we thought it right to take the opinion of all the judges upon it. Accordingly we consulted with all the judges, who are unanimously of opinion that unless possession *accompanies and follows* the deed, it is fraudulent and void; I lay stress upon the words "accompanies and follows," because I shall mention some cases where, though possession was not delivered at the time, the conveyance was not held to be fraudulent. There are many cases on this subject; from which it appears to me that the principle which I have stated never admitted of any serious doubt. So long ago as in the case in *Bulstrode*, the court held that an *absolute conveyance* or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance be *conditional*, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the con-

he accounting for the profits in the meantime to the trustees; and he accordingly continued in the visible possession of the goods after the assignment, and therefore the transfer was void by the stat. 13 *Eliz.* To this the defendants replied by shewing an undertaking by *Hayes* to account to those trustees for all the profits of the trade from the date of the assignment. The plaintiff contended, that neither that undertaking, nor the notice in the papers, was sufficient to shew the change of property, and therefore the transfer was void by the assignor's continuing in possession. The next defence set up by the defendants was a commission of bankrupt taken out against *Hayes* in January 1788, which was at the suit of the very persons who were privy to the deed of assignment, and who relied on that deed as an act of bankruptcy, under which commission the two trustees were chosen assignees. To this the plaintiff had urged that the commission of bankrupt, supposing it had duly issued, did not apply, because from the several dates it appeared, that the relation did not take place to over-haul the execution; and secondly, that it was not competent to the persons who had signed the deed of assignment, and were privies to the transaction, to set it up as an act of bankruptcy, whatever any other creditor might do who was no party to it.

*Chambers* shewed cause and argued the case very fully on both points. 1st, that this con-

veyance was not fraudulent under the circumstances by virtue of the 13 *Eliz.* and 2dly, that the persons who were privy to the deed were not estopped from setting it up as an act of bankruptcy; but finding the court were strongly against him on this latter point, he relinquished it, and relied on the first ground.

*Scott, Law, and Topping*, spoke to the former ground. But the substance of their arguments was repeated in arguing the case of *Edwards v. Harben*, which turned on the same point; and on that point the court took time to consider. But on the other,

*The Court* were clearly of opinion that the parties, who were privies, and had assented to the deed of assignment, could not set it up as an act of bankruptcy. That the two defences were utterly inconsistent; first relying on the assignment as a *bonâ fide* valid conveyance, and then insisting on it as a fraud on the bankrupt laws, and an act of bankruptcy. And they said that Lord Mansfield had given it as his opinion in *Hooper v. Smith*, 1 *Black.* 441. that those who were privy to a concerted act of bankruptcy could not take advantage of it (a).

(a) His lordship delivered the same opinion in the case of *Eyre and Another*, assignees of *Golden*, a bankrupt, against *Birbeck and Another*. Sittings after Mich. 1785, at *Guildhall*.

dition.



1788.

EDWARDS  
against  
HARBEN.

dition. Now here the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as *accompanying and following* the deed. That case has been universally followed by all the cases since. One of the strongest is quoted in *Bucknal and Others v. Roiston* (a); there one *Brewer*, having shipped a cargo of goods, borrowed of the plaintiff 600 l. on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff; there Sir *E. Northey* cited a case "where a man took out execution against another; by agreement between them the owner was to keep the possession of them upon certain terms, and afterwards another obtained judgment against the same man, and took the goods in execution; and it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession, and so no alteration made of the property." And he said it had been ruled forty times in his experience at *Guildhall*, that, if a man sell goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The Lord Chancellor held in the principal case that the trust of those goods appeared upon the very face of the bill of sale. That though they were sold to the plaintiffs, yet they trusted *Brewer* to negotiate and sell them for their advantage, and *Brewer's* keeping possession of them was not to give a false credit to him as in other cases which had been cited, but for a particular purpose agreed upon at the time of the sale. So that the Chancellor in that case proceeded on the distinction which I have taken; he supported the deed, because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law: that is the point which we have considered, and we are all of opinion that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudu-

(a) *Pr. in Chan.* 287.



lent. On the other hand there are cases, where the vendor has continued in possession, and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed. Such was the case of *Lord Cadogan v. Kennet* (a); because there the possession followed the deed. So also the case of *Haslington and Another v. Gill* (b) and *Another, Sheriff of Middlesex*: there personal property, consisting (*inter alia*) of some cows, was settled on the marriage of the plaintiff's wife on certain trusts; and the court held that only those which were purchased after the marriage could be taken to satisfy the debts of the husband. The second question then is, whether the defendant's having taken possession of these goods after *Mercer's* death, though under the bill of sale, will make him an executor *de son tort*. The two cases, which were cited by the defendant's counsel, are decisive of this point. In *Bac. Abr.* (c) it is said "if a man make a deed of gift of his goods in his life-time by covin to oust his creditors of their debts, yet after his death the vendee shall be charged for them." There too the possession was delivered to the vendee. To support this doctrine 13 H. 4. 4. b. *Rel. Abr.* 549. are both quoted. Then in what manner shall he be charged? He can only be charged as executor; because any intermeddling with the intestate's effects makes him so. The cases in *Cro. Ja.* and *Yelv.* cited at the bar prove it, and state the manner in which he shall be charged. There is also another strong case on this point in *Dyer* (d). In short every intermeddling after the death of the party makes the person so intermeddling an executor *de son tort*.

GROSE, J. observed that it was unnecessary to repeat what what had been said from the bench; but said that he was perfectly satisfied that the law was as had been stated.

Postea to the plaintiff.

The Court then made the rule absolute for granting a new trial in the case of *Bamford v. Baron*.

(a) *Cowp.* 432. (b) *Tr.* 24 Geo. 3. B. R. (c) 2 *Bac. Abr.* 605. (d) *Dy.* 166. b.



1788.

Saturday,  
May 31st.

After an order of removal not appealed from, a new settlement can only be gained by some act or cause altogether subsequent to the removal. Therefore if a pauper in service at *A.* under a hiring for a year be removed to *B.*, and does not appeal, but returns in a few days to his master at *A.*, is received by him, serves out the year, and is paid his full wages, yet he gains no settlement at *A.*

## The KING against The Inhabitants of KENILWORTH.

**THOMAS BYFIELD**, Mary his wife, and their three children, were removed from *Birmingham* to *Kenilworth*, both in the county of *Warwick*: on appeal the court of quarter-sessions confirmed the order of justices, subject to the opinion of this court on the following case.

The pauper *Thomas Byfield* was born and settled in the parish of *Kenilworth*. On the 10th of *May* 1765 he was hired to *Thomas Chatterton*, of *Birmingham* for one year; on the said 10th of *May* he entered into the said service, and continued in the same in the said parish of *Birmingham* until the 1st day of *April* 1766; when he was taken up on a charge of bastardy, and was married the next day. His master did not make any complaint against him, nor discharge him from his said service. On the 3d of the said month of *April* 1766 the pauper was removed by an order of removal from *Birmingham* to *Kenilworth*, and was delivered with such order to the officers of the said last mentioned parish, and continued under such order in the same parish until the 7th of the said month of *April* 1766, and then returned back to *Birmingham* into his said master's service, who willingly received him again; and the said pauper continued with his said master in *Birmingham* in such service until the end of the year, for which he was hired to him as aforesaid, and received his full years wages. The order of removal of the 3d of *April* 1766 was not appealed against.

*Bearcroft* and *Silvester*, in support of the order of sessions, relied upon the general rule that the order of removal unappealed against was conclusive that the settlement of the pauper was in *Kenilworth*.

*Willis* and *Shaw*, contra, admitted the rule, but insisted that it must be understood with this restriction; that it could not destroy any contract then subsisting, nor prevent the pauper removed from gaining any subsequent settlement in that place. Now though in this case the pauper might have appealed against the first order of removal, because he was in actual service at the time of his removal, and therefore it is not now competent to the parish of *Kenilworth* to take advantage of that objection, yet that order of removal did not dissolve their contract which was

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then



then subsisting between the master and servant, neither could it operate to defeat the settlement which the pauper gained by his subsequent service in *Birmingham*. Marriage does not dissolve any contract between the master and servant. *Salk.* 527. 529. Neither does a legal detainer, or imprisonment for any offence, which may interrupt the service, avoid the contract; it only makes it voidable at the election of the master. The cases of *The King v. The Inhabitants of Westmeon* (a); and *R. v. The Inhabitants of North Cray* (b), shew that the master might have discharged him, if he had pleased; but he did not, and his receiving the servant again is decisive that he would not avoid the contract on that ground. The master might have maintained an action against the servant for not performing the contract; and this would have been a decisive answer to any indictment which might have been preferred against the servant, for disobeying the first order of removal, by returning to *Birmingham* from whence he was removed. In *Dalt.* 246, it is said that an order of removal, unappealed against, is conclusive, *except where an after settlement can be fixed*. And the reason of it is that it is only an adjudication of the party's settlement at that time. 1 *Str.* 242. *Salk.* 489. 12 *Mod.* 668. *Burr. S. C.* 276. Now here the pauper gained a settlement in *Birmingham* subsequent to the first removal. He was originally hired for a year, and continued in service under that hiring for ten months; then after an absence of seven days he returned into the same service under a legal contract then subsisting, was received by his master, completed the year's service, and received his whole wages. And even if the absence were without the master's consent, it was purged by the subsequent reception by the master, which amounts to a dispensation of the service. *R. v. Eaton*, *Burr. S. C.* 47. *R. v. Oxleworth*, *Burr. S. C.* 302. *R. v. Islip*, *Str.* 423.

BULLER. J.—There is no proposition in the law of settlements more clear than this, that an order of removal unappealed against is conclusive against all the world; and this is so clearly and so universally established that it ought never to be impeached. At the same time, the rule is that the order of removal, though unappealed from, does not at all affect a subsequent settlement. Then the question here is whether the pauper gained any settlement in *Birmingham* subsequent to the order of removal? Now in this case he did no act by which he could gain a set-

(a) *Cald.* 129.(b) *H. 25 Geo. 3. R. R.*

tlement

1788.

The King  
against  
The Inhabitants of  
KENIL-  
WORTH



1788.

The KING  
against  
The Inhabi-  
tants of  
KENIL-  
WORTH.

tlement in *Birmingham* after the order of removal. The circumstances of the pauper's having been apprehended on a charge of bastardy, and of his marriage, I lay entirely out of the question; for it was competent to the master to receive him again after he was discharged out of custody, if he pleased; and the servant might have served his master, after he was married as well as before. But what I rely on is this, that after the order of removal, unappealed from, the pauper could not legally return to the parish from whence he had been removed; it would have been a crime in him to do so; and if he had been indicted for such a disobedience of the order, it would have been no defence to him to have urged that he returned for the purpose of completing his contract. The order of removal put an end to the service; and if he could not return without committing a crime, he could not be liable to an action by the master for not completing the contract. There is a great difference whether the party is disabled by his own act, or by the act of law, from performing his contract: he is answerable for the former; but if the law intervenes and says he shall not complete the contract, it puts an end to the contract. Now in this case the pauper returned after the order of removal to the parish of *Birmingham*, where he served a month; but that could not gain him a settlement there; for the act subsequent to the order of removal, by which he was to gain a settlement, should be complete in itself.

GROSE, J.—I doubt whether the party was liable to be removed; but there having been an order of removal unappealed from, it is decisive: and he has done no subsequent act to gain a settlement.

Rule discharged.

Saturday,  
May 31st.

BUCKLEY, Assignee of EDMUND BUCKLEY, a  
Bankrupt, against TAYLOR.

If a trader,  
after com-  
mitting an  
act of bank-  
ruptcy, take  
a shop, and agree to pay a year's rent in advance, where, by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an assignment under the commission, and before the year expired, may distrain the goods on the premises for half a year's rent; or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent.

THE assignee of the bankrupt brought this action against the defendant to recover 15 l. for work and labour, goods sold and delivered, money had and received, &c. The only cir-

cumstances



cumstances material to the question were these; The bankrupt, who had been in the cotton trade, after the act of bankruptcy on which the commission issued, &c. entered into an agreement with the defendant for the renting of a shop in *St. Helen's* at the yearly rent of 30*l.* by which it was stipulated that *Edmund Buckley* should pay half a year's rent in advance. He entered on the 1st of *May* 1787; and not long after a commission of bankrupt issuing against him, under which the plaintiff was chosen his assignee, his goods were sold upon the premises on the 18th of *October* 1787. At the sale the defendant bought goods to the amount of 46*l.* out of which he retained the sum of 15*l.* for half a year's rent, to recover which this action was brought. The defendant set up the agreement, and shewed a custom in this part of the country, that for cottages, shops, &c. the half year's rent should be due on the day the tenant entered. This cause was tried at the Sittings after last *Easter Term* at *Guildhall*, when the jury found a verdict for the defendant.

1788.

BUCKLEY  
against  
TAYLOR.

A rule having been obtained to shew cause why the verdict should not be set aside, and a new trial granted;

*Bower* and *Wood*, who now shewed cause, admitted that, if this had been a personal demand on the bankrupt, this verdict could not be supported; but contended that the defendant had a lien on all the tenant's effects on the estate to satisfy a year's rent. A commission of bankrupt has always been considered as analogous to an execution at common law; and the statute 8 *Ann. c. 14.* enacts that no goods in or upon any premises shall be liable to be taken in execution, without first paying to the landlord a year's rent due at the time of taking such goods. Now whatever would govern a common law execution is equally applicable to this case. In the case *Ex parte Plummer* (a), it was held that goods remaining on the premises were liable to the landlord's distress even after an assignment or sale by the assignees of the bankrupt (the tenant). Every thing upon the premises is liable to the landlord's distress, whether they be the effects of a tenant or a stranger. And this is a question of lien arising in respect of the *place* where the goods are found, and not in respect of the *person* to whom they belong. So that even if the bankrupt had fraudulently brought the goods of the assignees on the premises, they would equally have been subject to the

(a) 1 *Atk.* 103.



1788.

BUCKLEY  
against  
TAYLOR.

landlord's distress. Supposing this had been the case of a common law execution, and part of the rent had accrued subsequent to the delivery of the writ to the sheriff, when the goods are bound, and after which time the party cannot do any act to transfer them, the sheriff could not have removed the goods without first paying the year's rent. Then the bankrupt's goods in this case must be equally liable to the year's rent; since a commission of bankrupt has been repeatedly held to be of the same effect as a common law execution. If it be objected that the bankrupt could not make any contract to bind his effects, which were then vested in the assignees, it is to be observed that that is not the true question, but whether a demise made to a bankrupt be legal and valid. And though the landlord could not come in and prove his debt under the commission, yet the bankrupt was bound by the demise, and it was competent to the landlord to reserve the rent on the first, as well as the last, day of the term. Then it follows of course, and as a necessary incident to the power of demising, that he had a right to distrain every thing on the premises, without regard to the property in the goods distrained.

*Erskine, contra*, did not deny that the premises would be liable to a distress by the landlord in respect of the actual occupation of the tenant; and therefore, if a year's rent had been due at the time of the sale of the goods, the landlord would have been entitled to it against the assignees; but he insisted that, as the rent was not due in respect of the actual occupation of the tenant, it could not be due in respect of the contract; for that was collateral to the possession of the land, and it was not competent to the bankrupt to enter into any contract after he had committed an act of bankruptcy by which his effects could be bound. He admitted the analogy between the common law and statute executions; but contended that the provisions of the statute of *Anne* only extended to rent which had become due in respect of the actual occupation of the tenant. But in this case nothing was due from the bankrupt independent of the contract, and that contract was void as against the assignees. This is an attempt to do indirectly what could not be effected in a direct manner.

BULLER, J.—This question has been very properly brought before the court; and the case has been very well discussed. With respect to the custom of the country, I confess it was new



to me; but on the trial it was proved to be a common custom in many parts of the kingdom, and particularly in *Norfolk*; and I find on enquiry that it is a common custom that the landlord may distrain the first day. Then there seems to be no difference in point of law between an agreement of this sort and the common case of a letting for a year. In both cases the tenant is to enjoy the premises, and the landlord is to receive the rent; there is a *quid pro quo*. In general the landlord cannot distrain till the rent becomes due; but if the agreement be otherwise, I see no objection to it in point of law. It is true that the bankrupt could not have given a lien on particular goods, because after the bankruptcy he cannot enter into any contract to bind his effects. But he may take a demise; and if he does, and agrees that the rent shall be payable on a particular day, the law gives the landlord a power of distraining on that day. That makes the distinction between a lien on the premises themselves, and a lien on personal goods; the latter can only be made on the property in the goods; but in the former, it is a remedy which the landlord has on whatever goods are found on the premises.

GROSE, J.—The question is not whether the bankrupt himself is liable to an action on this agreement, but whether the landlord has the remedy claimed *in rem* on the goods on these premises. It is admitted by the plaintiff's counsel that, if a year's rent were due in respect of the occupation of the tenant, the landlord would have had a right to distrain. Now whether that rent was due or not depends on the custom of the county; and that is decisive, for by that custom half a year's rent became due the instant the tenant began to occupy. Therefore the landlord's right of distress was well founded; and if so, he is justified in retaining this money.

Rule discharged.

CROSSEY *against* ARKWRIGHT.

Saturday,  
May 31st.

THE plaintiff brought this action against the defendant, as sheriff of *Derbyshire*, for a false return on a *fi. facias* issued on a judgment recovered against *William Clarke*, at the

of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable from thenceforth, the sheriff is warranted in returning *nulla bona*, if it appear that the memorial of such annuity was not registered according to the directions of the annuity act, 17 G. 3. c. 26. s. 1, for in that case the deed is absolutely void.

Where a person against whom a writ of *fi. fa.* is taken out is in possession

suit

1788.

BUCKLEY  
*against*  
TAYLOR.



1788.

CROSSLEY

against  
ARK-  
WRIGHT.

suit of the plaintiff, and indorsed to levy 790*l.* &c. At the trial before *Buller, J.* at the Sittings at *Westminster* after last *Easter* Term, the plaintiff proved the judgment recovered against *Clarke* on the 27th of *August* 1787, for 1400*l.* in debt on bond, for a *bonâ fide* consideration; and then a copy of the execution, and the sheriff's return of *nulla bona*. Then, in order to prove the property of the goods levied in *Clarke*, an indenture was produced, which was executed on the 4th of *June* 1787, between *Edward Allanson* of the first part, and *William Clarke* of the second part; whereby, after reciting that 460*l.* was due from *Allanson* to *Clarke*, for which judgment had been confessed, and that *Clarke* had agreed to advance 20*l.* more, and to pay an annuity of 25*l.* *per annum* to *Allanson*, and provide him a decent apartment, *Allanson* assigned to him the possession of a farm; and all the crops, cattle, goods, and effects, &c. Of these the sheriff's officer had taken possession under the plaintiff's execution. But at the same time there was a distress for rent on the premises by the duke of *Norfolk*, made on the 8th of *June*. After this execution at the suit of the plaintiff, *Clarke* himself took the same goods in execution on a writ sued out by him upon a judgment against *Allanson*. The learned Judge being of opinion, upon an objection taken, that the deed in question was void, for want of an enrolment under the annuity act (a), and consequently that no property was proved in *Clarke*, nonsuited the plaintiff.

*Morgan* moved the court to set this nonsuit aside, and grant a new trial, on two grounds. First, that the deed was only voidable, and not actually void, for want of a memorial having been enrolled; and, secondly, that the sheriff, who was no party to it, could not take advantage of that defect, whatever the parties themselves might; and he compared this to the cases of *Fines* and *Recoveries*, which, though declared to be void, are only voidable. *Bull. N. P.* 224.

*Bower, Dayrell, and Wood*, shewed cause against the rule. The statute 17 *Geo. 3. c. 26. s. 1.* having declared that all deeds whereby annuities are granted shall be *null and void to all intents and purposes*, unless a proper memorial thereof be registered according to the method prescribed by the act, the question amounts to no more than this, whether the deed in question, which is admitted not to have been registered, shall be a valid and effectual

(a) 17 *Geo. 3. c. 26. s. 1.*



deed for the purpose of conveying the property of goods from *Allanfon* to *Clarke*. The bare statement of the question is sufficient to decide it. The present plaintiff can be in no better situation than *Clarke*; and therefore, if the latter had no property in the goods, those who claim under him cannot have a better title. As to the cases of Fines and Recoveries, which were assimilated to this, they do not bear the least analogy to it. The question in those cases was, whether the party wishing to take advantage of the stat. of *Westm. 2. c. 1.* as to fines, or the *11 H. 7. c. 20.* as to recoveries, was bound to plead it; and it was held that he was. But those acts of parliament treat of matters which in their nature can only relate to the parties themselves who are privy thereto, and cannot affect third persons; they declare that the fine or recovery shall be void; but the party for whose benefit the provision was intended may waive it if he pleases. The analogy between those cases and the present would indeed have held if the act in question had merely declared that the annuity should be void; but it goes further, and avoids the deed itself. This is more like the case of a gaming note, or one given for an usurious consideration, where such securities are absolutely void even in the hands of innocent indorsees; whereas, in the case of a note or bill given for a smuggling transaction, only the contract is avoided, and not the security, and therefore it is only void as against those persons who can be affected with knowledge of the illicit consideration. But here not only the contract is made void, but the instrument itself. But supposing this deed only to be voidable, it will make no difference here; for it is admitted that it is voidable by either of the parties: now, though perhaps *Allanfon* might not at present wish to avoid it, yet he may alter his opinion hereafter; and as the sheriff was apprised of the insufficiency of the transfer, he was justified in stopping his hand. Besides, it appears that at the time when the sheriff's officer came to levy execution under the plaintiff's writ upon these goods, the landlord had already distrained them; therefore, even supposing that the goods were the absolute property of *Clarke* by virtue of this deed, still they were not liable to be taken in execution while they were under the distress, being then in the custody of the law. On this ground it is immaterial in whom the property was.

*Erskine, Morgan, and Garrow*, in support of the rule. The question is, whether the goods upon the premises were the goods

1788.

CROSSLEY  
against  
ARK-  
WRIGHT.



1788.

CROSSLEY  
against  
ARK-  
WRIGHT.

of *Clarke* at the time when the sheriff made his return of *nulla bona*, or whether they then so far belonged to *Allan* as to warrant the sheriff in making that return: First, the deed cannot be considered as absolutely void. There are several statutes which are worded as strongly as this of 17 G. 3. declaring in terms as express that the deeds to which they refer shall be absolutely null and void to all intents and purposes; and yet the courts have construed them to mean only voidable at the election of the parties concerned. Such are the cases of Fines and Recoveries. 2 Inst. 336. 3 Co. 59. b. 60. So the stat. 1 Eliz. c. 19. which provides that all grants, leases, &c. made by bishops in other manner than is mentioned in the act, shall be utterly void and of no effect, to all intents and purposes, has yet been construed to be only voidable as to the successor for whose benefit it was intended, but good as to the grantor himself (a). And a similar construction has been made on 13 Eliz. c. 10. relative to leases made by a dean and chapter (b). Again, in an indictment for forging (c) a bill of exchange, all the judges lately held that it need not be stamped, upon an objection being taken that it could not be received in evidence unless it was first stamped, although the act 23 G. 3. c. 49. imposing a duty on such instruments expressly says, that no bill of exchange shall be received in evidence, unless it be first duly stamped. But even if the court should not be inclined to adopt that construction in the present case, at all events the deed can only be held void as far as respects the annuity; and good as to the other parts. The annuity was not the principal inducement to granting the deed; it makes but a very small part of it; there was an antecedent and a meritorious consideration, namely, the debt and judgment. It would be attended with mischievous consequences, if every deed, comprehending other matters, were liable to be set aside because a small annuity was secured by it, which the parties had omitted to register. The act of parliament was only intended to guard against fraudulent annuities, given without any, or sufficient, consideration, and where the annuity itself was the principal motive to the deed. Family settlements will be liable to be overturned if the court were to extend the construction of the act beyond that line: it frequently happens that small annuities are secured by them (d). Where

(a) 10 Co. 59. a. Cro. Eliz. 207.

(b) 1 Bl. Com. 87. Co. Lit. 45. a. 3 Co.

(c) R. v. Hawkefwood, E. 23 G. 3. on a question reserved from the Worcester Assizes

before Buller, J. for the opinion of all the judges.

(d) See the last section of the act, which provides that it shall not extend to these sorts of cases.



it appeared that there was a meritorious consideration for the grant, a court of equity would compel the party to register the deed, and would not suffer him to take advantage of his own laches. *Clarke* in this case might have registered the deed if he had pleased. The court cannot intend that he is desirous of setting it aside; if he had been, he might have applied to this court to have it cancelled, but no such application having been made, the presumption is that he chose it should stand; he waves the benefit which the act holds out to the grantors of annuities. 2dly, if then, according to the authorities cited, this deed was not absolutely void, but only voidable by the parties, and they have not elected to avoid it, no advantage can be taken of the neglect by third persons. It would be strange indeed if it were in the power of third persons, who are indifferent to the transaction, and have no interest in the subject, to vacate a contract solemnly made between two others who are content to abide by it. It is a maxim that every person may wave the benefit of a law introduced for himself; but according to the doctrine maintained on the other side, it is in the power of every third person to compel him to take advantage of it, whether he will or not. It is plain too by the provisions of the act in this case, that no such liberty was intended as the defendant assumes; for the third section only gives the grantor a power of applying to the court to cancel the instrument. It should seem therefore that the legislature intended that no other person should take advantage of any defect. Besides, if this objection were to prevail, it would make an opening to fraud; for a person might gain credit upon the possession of goods under such a deed as the present; and afterwards when any creditor sued out execution, this objection would be set up in order to defeat his suit. And after all, the judgment of the court in this case in favour of the defendant will not restore the possession of these goods to *Edward Allanson*, but *Clarke* will still remain the owner of them, if the parties themselves are determined to abide by their contract; and the only effect of such a determination will be to enable *Clarke* to hold his creditors at defiance.

**BULLER, J.**—The question, whether, as a distress had been made on the premises, the sheriff was at liberty to take the goods in execution, was not considered at the trial. It is immaterial to consider in this stage of the business what a court of equity would have done if an application had been made to them to enforce

1788.

CROSSKEY  
against  
ARK-  
WRIGHT.



1788.

CROSSLEY  
against  
ARK-  
WRIGHT.

force the registering of the deed: but the terms on which they would compel it are against the argument used by the plaintiff's counsel; for they could not say that a deed which was actually void in point of law was good, but, as between the parties themselves, they would do what was right by a side wind. If the court of equity interposed, it would be by saying, that the party who had granted the annuity shall not retain the consideration money against conscience; but if he did retain the money, they would compel him to make a new grant and to register it. It is also immaterial here to say, whether, in the instance put of a family settlement, containing the grant of a small annuity, a court of equity would consider it as two distinct deeds for that purpose. But the objection now is, that the deed itself is void because the memorial was not registered according to the directions of the annuity act. The words of this statute are as strong as possible; it makes the deed void to all intents and purposes whatsoever. And in none of the numberless cases which have arisen upon this act, has it ever been doubted but that annuity deeds not registered conformable to the statute were void. The cases cited on behalf of the plaintiff do not apply: first, as to those relating to matters of record, they stand on a very different ground. And, secondly, as to leases made by ecclesiastical persons: the object of those laws was to prevent ecclesiastical persons binding their successors without their consent; and therefore the courts have said, that they may bind themselves, but not their successors. But the cases of annuity deeds proceed on different principles. We all know the mischiefs that ensued the granting of annuities previous to the statute 17 Geo. 3. They are not granted for a number of years only, but for life, and generally by distressed men, who cannot offer any security beyond their own lives. And unless they can be avoided by the parties themselves, they cannot be avoided at all. And if we were to determine that an annuity, granted for the life of the grantor only, cannot be avoided during his life, such a construction would repeal the act of parliament. The two statutes alluded to, relating to gaming and usury, are very apposite; the provisions of those statutes are similar to those of the one in question; and it has been determined, that those securities are void even in the hands of innocent purchasers. But there is another circumstance in this case which is decisive; it has been properly admitted in the argument, that at all events the parties themselves may avoid  
the



the deed: then let us consider, whether, under these circumstances, they have not elected to avoid it? In my opinion the act done by *Clarke* shews his election to avoid it. He had possession of these goods under the deed, dated the 4th of June 1787; so long as that deed continued in force, the property was his; but not relying upon that, he afterwards sued out execution against these very goods, and by that he declared his election to avoid the deed. This cannot be likened to the case of a deed by which a small annuity is reserved to a person not privy to the other parts of the deed; because here the annuity is the very consideration of granting the goods; therefore the transaction is entire, and must stand for the whole, or be defeated for the whole. And here *Clarke* has said that he would not abide by it. With respect to the case of a contract upon paper not stamped, that is widely different from the present case. The stamp acts are merely revenue laws: there are clauses in some of the old ones to enable the party who has made a contract on unstamped paper to get it stamped after it is made on paying a certain penalty: now all these acts, being made *in pari materia*, must be taken together; and though they say that such a paper shall be void, yet they make a provision to make it good; and therefore if it be stamped at the time it is produced, it is sufficient. The case also of a criminal prosecution for a forgery committed on unstamped paper stands on a different ground: the statutes only speak of deeds which are avoidable in law if not stamped: but in the case of a forgery, the instrument is not produced as a good deed, but as a false one. Then it is not competent to the person, making such false deed, to say on a criminal enquiry that it is not good on another account; for if the instrument be false, and it be made with a view to deceive, that is sufficient to constitute a forgery.

GROSE, J.—I cannot form any opinion with respect to the real merits of this case. But the question before the court now is between the plaintiff on the one hand, and the sheriff on the other, in which the court is to determine, whether the goods taken under the execution against *Clarke* at the suit of the plaintiff, be the goods of *Clarke* or not. It has been said that *Clarke's* being in possession of them is *prima facie* evidence of the property being in him: so it is; but if that possession be gained by the deed, and that deed come before the court, we must see whether it conveys the property or not; and that brings us to the question, whether the deed is or is not void to all intents

1788.

CROSSLEY  
against  
ARK-  
WRIGHT.



1788.

CROSSLEY  
against  
ARK-  
WRIGHT.

and purposes, under the act of parliament. If it be, the plaintiff cannot recover. Then it is material to consider the situation of the parties: a writ was delivered to the sheriff to take in execution the goods of *Clarke*; this deed was then put into his hands, by which he saw that an annuity was granted; and he also knew that it was void by the statute, because it was not registered. Then after the act has declared that such a deed is void to all intents and purposes, it would have been imprudent in the sheriff to have continued in possession of the goods of which there was no valid conveyance. Whether *Allanfon* or *Clarke* intended to dispute the validity of this deed, I cannot say: but I conceive that either the one or the other would dispute it, as it might be convenient for him to do so; for no counterpart of it was executed to *Allanfon* in order that he might have registered it. Then the observation with respect to what *Clarke* did afterwards satisfies me that it was his intention to avoid the deed: that was not known to the world: but if any other person chose to claim under this deed, either of them would say that the deed was void. The argument by analogy from the statutes relating to usury and gaming applies strongly to the present case. I lay aside all consideration of fraud; because, without laying any stress upon the question of fraud, I am of opinion that the deed is void in point of law; consequently that the sheriff made a proper return, and that the non-suit must stand.

Rule discharged.

Monday,  
June 2d.

ATHERFOLD against BEARD.

A wager respecting the amount of any branch of the public revenues is illegal, because it leads to an improper discussion, and is contrary to sound policy.

THIS was an action of *assumpsit* upon a wager of five guineas, whether the *Canterbury* collection of the duties upon hops for the year 1786 would amount to more than the *Canterbury* collection for the preceding year; the plaintiff affirmed that it would, the defendant that it would not. The declaration contained several counts, but the plaintiff took a verdict on the fifth, which was in substance as above. At the trial, evidence was given of the defendant's admission that he had lost the wager, on which evidence alone the verdict was given. *Erskine* moved for a rule last *Easter* term to shew cause why the verdict should not be set aside, on the ground that the defendant's admission ought not to have been received in evidence;



dence; or, secondly, why the judgment should not be arrested. On the day for shewing cause in the last term, the court said there was no foundation for granting a new trial; and desired that the rule for arresting the judgment might be argued in this term.

1788.

ATHERFOLD  
against  
BEARD.

*Bond*, Serjt. and *Adam*, now shewed cause against the rule. Wagers in general are permitted by the common law. 11 Rep. 87. b. And actions have been entertained on a variety of subjects of this sort, as in *Andrews* and *Herne* (a), where a wager was laid that *Charles Stewart* would be king of *England* within twelve months then next following, he being then in exile, which was held good. So in *The Earl of March v. Pigot* (b), where two heirs betted on the lives of their respective fathers. And in *Murray v. Kelley*, M. 25 G. 3. on a rule to shew cause why the defendant should not be discharged on filing common bail, on the ground that the action was on a wager, the wager appeared to be whether *A.* kept a military academy at such a place. Lord *Mansfield* enquired into the case of *Foster v. Thackery* (c), and then said that this was merely a wager on a private event, and he saw no reason why it should not be considered as a legal debt; and the rule was discharged. The form of trying issues directed by the court of Chancery is also decisive that wagers in general are permitted. The only instances of wagers, on which actions cannot be maintained are, first, such as tend to create an improper bias in the minds of the parties respecting the exercise of some office, privilege, or duty. Secondly, such as are prohibited by act of parliament. Thirdly, such as are *contra bonos mores*. Fourthly, such as tend manifestly to the injury of third persons, or of the public at large. Of the first sort is *Allen* and *Hearne* (d), where a wager between two electors on the event of the election was held void. In that case the wager was considered as raising an improper bias in the minds of the parties to vote for this or that candidate, which would have been subversive of the freedom of elections, and detrimental to the constitution. But the court did not say in that case that such a wager would have been void if made between parties who had no concern with the election. And upon that principle was the case of *Jones v. Randal* (e), determined to be a good wager, which was on the event of an appeal in the House of Lords, because it was not made between parties who could in any de-

(a) 1 Lev. 33. (b) 5 Burr. 2802. (c) Ante, 1 vol. 57. (d) Ante, 1 vol. 56.  
(e) Cowp. 37.



1788.

ATHERFOLD  
against  
BEARD.

gree bias the judgment of the house. But it was there said that had it been made with a lord of parliament, it would have been void. Now it does not appear that these parties were hop-growers, and consequently neither could be instrumental in diminishing the revenue in any degree on account of any bias arising from this wager, even if it could be supposed that so trifling a sum as that in dispute could be capable of influencing the mind to make such an attempt. Neither could this wager have induced any defalcation of the revenue, by deterring either party from growing hops; for it was made after the hops had been planted and were in blossom, when it was too late to apply the ground to any other sort of cultivation. And besides it was said by Lord *Mansfield*, in the case of *The King* against *St. Luke's Hospital* (a), that rates, taxes, &c. chargeable upon landed property, depend altogether upon the will of the owner. He may use the ground in the manner he likes best, or even not at all if he so chooses. From whence it appears that the public is not at all interested in the disposition of lands till the produce is received, in respect of which only those duties arise. Nor can it be unlawful for any man to follow his own discretion in adopting this or that species of cultivation. And again too it is to be considered that the quantity of hops must necessarily depend on the seasons and various other circumstances over which the parties can have no control. Under the second head of objection are included wagering policies, wherein the parties have no real interest, which are made void by 14 *Geo. 3. c. 48*. But that does not extend to these sorts of wagers, but is confined merely to policies, and seems to have been so considered in *Roebuck v. Hammerton*, *Cowp.* 737. It was indeed thought necessary during the war in 1708 to pass an act (b) to prevent wagers relating to that war; but that act reached no further, and expired with the war which gave rise to it. But it is fairly to be collected from thence that wagers of that sort were not prohibited before the passing of that statute, and are now become legal again. Thirdly, wagers which are *contra bonos mores* are illegal, *Cowp.* 39. The fourth class consists of such wagers as tend manifestly to the injury of private individuals, or of the public. This may be done in the one case, either by making a wager to commit some personal wrong to another, as by beating him; or by raising a discussion pre-

(a) 2 *Burr.* 1064.(b) 7 *Ann.* c. 16.



judicial to his character or feelings; as was the case of *Da Costa v. Jones* (a), which was a wager respecting the sex of the Chevalier *D'Eon*. On the other hand it was also said by Lord *Mansfield* in *Jones v. Randal* (b), that the law does not allow of wagers against sound policy; and it may be contended that the present is of that description. But upon consideration it will not appear to be so. Nor can the public be in the remotest degree injured by a discussion of this subject. By 9 *Ann. c. 12. s. 1.* there shall be paid a duty of 1 *d.* for every pound of hops grown in *Great Britain*, cured, and made fit for use; and by the 5th section that duty is placed under the management of the commissioners of excise, and by further provisions in the act the respective places of growth are directed to be ascertained. From hence it appears that the most certain medium of proof of the growth of hops in any particular place is the excise officer's book. Now this being a matter of notoriety in itself, the public could not possibly be prejudiced by the production of this evidence. It does not disclose any thing of which advantage can be taken by enemies. So far from any injury arising to the state from the amount of its revenue being known, it is frequently a matter of public debate, and the principle has always been adopted that such information is conducive to its prosperity. Upon this occasion the excise officer was served with a *subpœna duces tecum*; and though perhaps, according to the opinions of Lord *Mansfield* and Mr. Justice *Ashturst* in two cases severally tried before them at *Nisi Prius*, the officer might have objected to produce his book, yet the discussion of that question was rendered unnecessary by proof of a confession, made by the defendant himself, that he had lost the wager. Admitting therefore for an instant that the officer would have been justified in refusing to produce the accounts, still as the plaintiff was enabled to establish his case by another medium of proof, which is held sufficient by the rules of evidence, the objection, if any, was completely done away.

*Erskine* and *Garrow* in support of the rule. No principle is better established than that an action cannot be maintained upon a wager which is contrary to sound policy. This was expressly laid down by Lord *Mansfield* in *Jones v. Randal* (c), who also said that notwithstanding a wagering contract was not prohibited by any positive law, nor adjudged illegal by any precedents,

(a) *Cowp.* 729.(b) *Cowp.* 39.(c) *Cowp.* 39.

1788.

ATHERFOLD  
against  
BEARD.



1788.

ATHERFOLD  
against  
BEARD.

yet it may be decided to be so upon principles. Now the present wager is against the principle of sound policy; for it tends to the injury of the revenue and to the public detriment. It is not lawful for a man to lay a wager that the revenue shall be less one year than another, because he immediately makes himself interested in the diminution of it. And if this were allowable in one district, similar wagers may be laid respecting the amount all over the kingdom, and the officer of excise may be summoned to every assize town in the progress of the different circuits. Nor will the mischief stop here; for wagers may equally be laid on the amount of every branch of the revenue; and thus numbers of people may be engaged in defrauding government. Foreigners too may make an improper use of such a licence, and by means of the process of our own courts gain intelligence of all the internal resources in the kingdom. The parties had no interest whatever in the subject matter of this wager before it was laid; and that is a complete answer to the argument which has been drawn from the practice of the court of Chancery in directing feigned issues to be tried, and to the generality of the cases where actions upon wagers have been permitted. But this is an idle wager between two persons having no concern in the subject matter to draw into judicial discussion matters of public moment. As to the case of *Andrews* and *Herne* (a), that was before the statute 14 Geo. 3. c. 48. which was passed for the express purpose of preventing persons from insuring events in which they were not interested. And it should seem that the spirit of that act extends as well to oral wagers as to such as are reduced to writing in the form of a policy: and that it ought to be construed in affirmance of the common law, which rejects every species of gaming. But at any rate it is decisive against this wager that it militates against sound policy, by drawing into discussion an improper subject detrimental to the public interest: and if in its consequences it is likely to produce any injury to the revenue it is void and illegal on the face of the record, and cannot be supported by any evidence whatever. And the admission that the excise officer could not have been compelled to produce his books is decisive of the question; for if the parties had a right to lay this wager, the law would also give them a right to compel the production of that which is certainly the best evidence upon the

(a) 1. Lew. 33.

subject.



subject. Then if this were improper evidence to be admitted, which was necessary to sustain the declaration, according to the case of *Jones v. Randal (a)*, that is a good ground for arresting the judgment.

1788.

ATHERFOLD  
against  
BEARD.

ASHHURST, J.—In my opinion the courts have gone far enough in encouraging impertinent wagers. Perhaps it would have been better for the public if the courts had originally determined that no action to enforce the payment of wagers should be permitted: as far however as the determinations have gone we are bound by authority; but I think we ought not to go further. Now I am of opinion that the present case falls within the principle of those wagers which have been determined not to be good; the courts have said that wagers shall not be allowed which tend to introduce indecent discussions, or which in the event may have an influence on the public policy of the kingdom. On this principle a wager on the event of an election of members to serve in parliament was held to be illegal, because the persons laying the wager were interested in altering the free course of election. The present wager also appears to me to fall under the same class of objection, because it is against the sound policy of the kingdom. It might be attended with mischievous consequences to permit any two persons by the means of laying an impertinent wager to bring forward a discussion of this sort, and expose to all the world the amount of the public revenue. The parliament is the proper place in which these questions are to be discussed; and it would be improper to permit it elsewhere. The plaintiff's counsel have admitted that the officers of excise were not bound to produce the public books. And indeed it would be highly inconvenient if they were liable to be called upon by every individual for that purpose. Now that goes the whole length of determining this case; for if the wager be such that the best evidence by which it must be proved is improper to be admitted, that circumstance shews that the wager is in itself illegal; and if so, no admission of the party that he has lost the wager can make that legal which is in its nature illegal. For he has a right to say that, though he has lost his wager, originally it was illegal, and he may refuse to pay it on that ground. Therefore I am clearly of opinion that this judgment ought to be arrested.

(a) Cowp. 37.

BULLER,



1788.

ATHERFOLD  
against  
BEARD.

BULLER, J.—This is the case of an idle wager between two persons, who have no concern in the subject, to draw into question a matter that respects the interest and general importance of the country: and on that ground I think that the wager is illegal. I do not find that it has ever been established as a position of law that a wager between two persons, not interested in the subject matter, is legal. If it were so by the law of *England*, we must be bound by it: if not, I should hold otherwise. Such a wager is not permitted by the laws of other countries; it is not allowed by the civil law, nor by the law of *Scotland*; and a determination on that point, which came from the court of Sessions in *Scotland*, was affirmed here in the House of Lords on an appeal. But however the question may be as to wagers in general, the distinction which has been taken in former cases will govern this. What Lord *Mansfield* said in the case of *Murray v. Kelly* is directly applicable to this; he said that that wager was good because it was on a *private* event: from whence it is to be inferred that in his opinion it would have been void, had it been on a *public* event. The objection in this case has greater weight than that in *Foster and Thackeray*; for there the event, on which the wager was founded, was a matter of notoriety to all the world. But this wager could not be proved without searching the books relating to the revenues of the country. And I am glad to find that in the only two cases where this question has arisen at *Nisi Prius*, Lord *Mansfield* and my brother *Ashurst* were both of opinion that the officers were not bound to produce the revenue books. If it were necessary to have recourse to it, I incline to think, with the opinion (a) of this court and that of the Common Pleas, that the statute of 14 *Geo. 3.* would reach the present case. For though the statute speaks only of *policies*, yet I think it may extend to cases like the present. For either the courts must restrain that act of parliament to such cases as *in form* are *policies*, which would entirely repeal the statute; or, by pursuing *the spirit* of the act, extend it to *all cases*. I think the latter is the true construction; for a policy is nothing but a promise. And it would be strange to determine that the party might do the same thing in one form which the statute has expressly prohibited to be done in another.

GROSE, J.—I agree entirely on principle with my brothers. And as to the admission of the party, if that were a sufficient

(a) In *Foster v. Thackeray*.



Barbours 2. Bro. Cha. Cas. 22.  
2. Terin Rep. 241.

Ref<sup>t</sup> Dunn  
Sh. before her son

Jane  
D<sup>o</sup>

James Dunn.  
When whose marriage  
settled the will the case  
arose.

Dorothy Wright.  
D<sup>o</sup>

James  
unmarried &  
Dea. S. B.  
suffered  
accident  
& deviled to  
his nephew  
James.

Margaret  
mar. to  
W. Wright.  
A Def.

Wright  
I marr. to  
W. Ch. Robinson,  
who is dead  
the prob.  
the claimed  
see under opposite  
under father's will.

Ana, Cath.  
married  
to W. Ch. Robinson  
her father.  
John:  
A Def.  
Claimed  
under will  
of his mother



answer to the objection, it might equally be given in every case on an objection to the legality of the wager in arrest of judgment. But this is an objection appearing upon the face of the record, and the confession of the party cannot appear there. Therefore, on the principle of sound policy, I am clearly of opinion that the judgment must be arrested.

Judgment arrested.

1788.

ATHERFOLD  
against  
BEARD.

The KING *against* LEWIS.

Monday,  
June 2d.

**M**ORGAN having obtained a rule to shew cause why an attachment should not go against the defendant, who was sheriff of *Monmouthshire*, for neglecting to take a replevin bond,

Attachment  
against a she-  
riff for ne-  
glecting to  
take a re-  
plevin bond  
refused.

*Russell* now shewed cause, and observed that an attachment for such a charge had never been granted before, because the party injured might maintain an action against the sheriff, which was an answer to the application. And that this could not by any means be construed to be an abuse of the process of the court, or a contempt, which were the sole grounds for an attachment. And

*The Court*, being of that opinion, discharged the rule.

Rule discharged.

DEEY *against* SHEE.

Wednesday,  
June 4th.

**T**HE declaration stated that before and at the time of the making of the promise and undertaking next therein after mentioned the defendant was a dealer in lottery tickets, and had formed a certain plan or scheme for the selling of, and had intended to sell, whole tickets and shares of tickets of and in a certain state or government *Irish* lottery, before then duly established for 1787, upon the terms following; that is to say, that the purchasers of such tickets and shares of tickets respectively should be entitled to and have the benefit of all prizes such tickets should be respectively drawn, except those of 10*l.* and that the benefit and advantage of the prizes and shares of prizes of 10*l.*, which such tickets should be respectively drawn,

The sale of  
lottery tick-  
ets by which  
the purchaser  
is to be en-  
titled to all  
the benefit  
of them, ex-  
cept the 10*l.*  
prizes, is  
prohibited  
and made  
void by 22  
Geo. 3. c. 47.

7 T

should



1788.

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DEEY  
against  
SHEE.

should be and remain to the said defendant; and that afterwards and after the establishment of the said state or government *Irish* lottery for the said year 1787, and before the drawing of the same, to wit, on the 24th of *October* 1787, at *London &c.* it was agreed by and between the plaintiff and defendant in manner following, that is to say, the plaintiff agreed to furnish the said defendant with *Irish* state lottery tickets for the year 1787 at the market price, to receive from him only 4 *l.* odd shillings, that is to say, for each such ticket, whatever the plan might produce on the sale, to have lodged with him, the said plaintiff, the commissioners or bankers receipts, and at the expiration of the drawing of the said lottery to appropriate the prizes of 20 *l.* and upwards to the holders of the chance sold; those of 10 *l.* to be applied to the general account, and, first paying the plaintiff the intermediate price, that is to say, the difference between the said 4 *l.* odd shillings a ticket as aforesaid and the market price of such ticket, then to divide the profits, two thirds to the defendant, and one third to the plaintiff. But it was understood that any loss or deficiency in the produce of the prizes, which the plaintiff was to sell at the fair market price, should be borne by the said plaintiff only, who, on the other hand, was not subject to any expence. And the said agreement being so made, &c. Then followed mutual promises to perform the said agreement. And the plaintiff averred that afterwards he did furnish the defendant, at his special instance and request, with divers, to wit, twenty-five tickets of the said state or government *Irish* lottery for the said year 1787, and that the market price of the said tickets then and there was 6 *l.* 10 *s.* by the ticket, making in the whole a large sum of money, to wit, 162 *l.* 10 *s.* The declaration likewise stated that at other times the plaintiff had furnished other tickets to the defendant [specifying them, and their prices]. The declaration then averred that there was not any loss or deficiency on the produce of the prizes in the said agreement mentioned at the expiration of the drawing of the said state or government *Irish* lottery; but, on the contrary, divers large profits, together with and over and besides the respective market prices of the said tickets as aforesaid, accrued and were received by the defendant by and from the sale of divers of the said tickets in whole tickets and shares as aforesaid, and by and from the 10 *l.* prizes arising upon divers of the said tickets, and by and from other prizes arising upon such of the said tickets  
and



and shares of tickets as remained unfold in the hands of the defendant, amounting to a large sum, &c. Yet that the defendant hath not paid, &c. Plea, the general issue.

After verdict for the plaintiff, a motion was made in arrest of judgment.

*Wood.* This question turns on the 22 G. 3. c. 47. which enables the holders of tickets to sell the whole of a ticket, or in shares not less than a sixteenth; and it is contended that the agreement between the parties is void, because by the terms of it the purchaser of the ticket was not entitled to the benefit of the 10 l. prizes. But there is no express provision in the act against such sales as the present; neither will they appear to counteract in any degree the spirit of it. The only restriction in the act relative to the sale of chances is in the 13th section, which provides that no chance of a ticket shall be sold *for any time less than the whole time of drawing*. That regulation has been here complied with. But it is permitted to sell the chance of a ticket for the whole time; and these tickets were sold for the whole time of drawing; and in reality this agreement amounts to nothing more than a partnership between the parties, who agreed to divide the benefits according to a certain proportion settled between themselves; and there is nothing in the act to prohibit them from so doing. This is a penal statute, and ought to be construed strictly according to the plain import of the letter. Neither is this agreement inconsistent with the spirit of the act. The general object of it was to prevent persons from setting up lotteries of their own, and thereby injuring the sale of the government tickets. Now this sort of agreement, so far from frustrating, promotes the purposes of the state lottery, because such a contract cannot be entered into without first purchasing a ticket in the state lottery. This is widely different from the common case of insuring against events in the lottery, because that may be carried on without the actual purchase of tickets, but this cannot, but is a *bonâ fide* contract for the actual purchase of a ticket for the whole time of drawing; and as to the proportion in which each is to be benefited, that cannot affect the interest of government, provided a state lottery ticket is really purchased between them.

*Erskine, contra.* The object of the act was not merely to prevent the state lottery from being injured, but also to prevent designing persons from taking advantage of the ignorant or necessi-

1788.

DEEY  
against  
SHEE.



1788.

DEBY  
against  
SHEE.

tous. The preamble of the act points out very clearly the intention of the legislature, which was to prohibit every species of adventuring except that specifically sanctioned by the act, namely, by the real and actual sale of a ticket, or of some entire share of such ticket, not less than a sixteenth, for the whole time of drawing. The reason why this was required was because it could easily be ascertained what the real value of any such specific share amounted to, by comparing it with the worth of the whole; whereas if it were left *ad libitum* to the seller how he would divide the chances of each ticket, it would then be in his power to defraud the unwary by holding forth specious pretences, while in reality the benefit to be obtained was not adequate to the risk; and thus one of the principal designs of the legislature would be frustrated. The real and actual sale of a ticket means an *absolute* sale of the ticket, by which the purchaser shall be entitled to the *whole* profits, for the whole time of drawing. Now the agreement in question was not for the real and actual sale of a ticket, in this sense; for nothing amounts to that, unless the purchaser is entitled to *all* the benefit of it, namely, to every prize in the lottery, or, in case of shares, to the respective proportions of such prizes. Nor is this agreement consistent with the express provisions of the act; for the ticket, when divided into shares, is required to be deposited with the commissioners, which is not made necessary according to the terms of this agreement, it being in the alternative, either with the commissioners, or banker. And if this sort of adventuring be legal, a ticket may be in effect divided, though not nominally, into a greater number of shares than are allowed by the act; for after being divided into as many shares as the act permits, each of those shares may be sold, upon the chance of every description of prizes in the lottery, to as many different persons. This would be the means of licensing that inferior sort of gambling amongst the poorer class, and subjecting them to that imposition, which it was the policy and aim of this act to prevent.

ASHHURST, J.—It appears from the penning of this act of parliament that the legislature had two objects in view. The first that the government and the public should not be injured by individuals setting up private lotteries of their own, which were to be regulated by the drawing of the public one, and which might injure the sale of tickets in the public lottery; and the other,



other, to provide for the security of individuals, and to guard against any imposition upon them. And the regulations for these purposes are either that the tickets shall be sold absolutely, or that they shall be apportioned out in shares of the whole tickets, not less than sixteenths; but still they were to convey the absolute interest in the ticket or share at all events. And the legislature had good reason for making these regulations, because the value of the respective shares was easily calculated: but if it were competent to individuals to make any other calculations than those mentioned by the act of parliament, it would be an inlet to frauds; for the common sort of people are not able to enter into such sort of calculations, and it would be easy to impose on men of common apprehensions by schemes of this sort, as in this instance by saying that they would be entitled to the chance of all except the 10% prizes, though these constitute the greater part of the prizes in the lottery. Now this case does not fall within either of the provisions allowed by the act. It is neither the absolute sale of a whole ticket, nor of the share of one. And the general clause in the act of parliament declares that all sales not according to the regulations of the act shall be void to all intents and purposes. This is a new mode of sale not allowed by the legislature, and cannot therefore be sustained.

BULLER, J.—Under this act of parliament there is only one way of disposing of any interest in a ticket less than the whole, and that is in shares not less than sixteenths. Such are the regulations of the act; but neither of those has been complied with here. The act directs that the tickets, which are to be sold in shares, shall first be deposited with the commissioners, who are to take care that not more than sixteen parts of each ticket shall be delivered out. They are to superintend the distribution of shares, and not private persons. One great object of the legislature was to prevent the lower sort of people from being imposed upon. Great mischiefs had ensued from the temptations which were held out to poor persons of adventuring for small sums. The preamble to the thirteenth section is very strong; “In order to prevent all adventuring with lottery tickets, other than such as shall necessarily arise from the *real and actual sale* of such tickets, and of such shares thereof as are hereby permitted.” Now there cannot be any *real and actual sale* of a ticket, unless it be an *absolute sale*. And as to

1788.

DEEY  
against  
SHEP.



1788.

DEBY  
against  
SHEE.

shares, it is expressly pointed out by the statute what shares are meant. So that it appears that the legislature intended to prohibit all adventuring, except by the absolute sale of a ticket, or the sale of a share not less than a sixteenth. If this agreement were allowed, it would extend to all the chances mentioned by the defendant's counsel, and the holder of a ticket might sell each of these chances to ten different persons, on the event of the ten different classes of prizes. But in my opinion these are chances which are prohibited by the act of parliament, and therefore this agreement is void.

GROSE, J. declared himself of the same opinion.

Judgment arrested.

Saturday,  
June 7th.

The KING against The Inhabitants of ODIBAM.

A service for  
a year, under  
an hiring to  
serve as an  
ostler at so  
much per  
week, with-  
out fixing  
any time of  
service, will  
not give a  
settlement.

**T**HOMAS BOWMAN, the pauper, went to live with Mr. Joseph Rhodes, of St. Mary Lambeth, Surry, livery-stable keeper and post-chaise letter, as under ostler, at 9 s. per week, without fixing any time for the expiration of such service. Some time after he had been there, a post-boy went away, and the pauper was by his master Rhodes turned over to take his place, at 3 s. per week, and the money he could get from the persons he drove. He remained in such service upwards of two years, and more than one in the last employment as post-boy; during the whole time he found himself victuals, and lodged in a room or loft belonging to his master in the yard, received his 3 s. per week, and what he could get for driving. Some time after the pauper left the said service he returned to it again, when Rhodes told him he might go to work, and then remained one year under that agreement. Some time after he left the service he returned to it a third time, in or about a month of February, as an odd man, without wages, and continued under this last agreement till three weeks after Christmas. When he first went he saw, and had some conversation with, the head ostler, and was some days about the yard before he entered into any service; he then asked his master Rhodes for his place, who told him he might have it. The pauper was removed, together with his wife, from Odibam, Southampton, to Lambeth, Surry, by an order of justices, which the sessions quashed on appeal.



A rule having been obtained to shew cause why the order of sessions should not be quashed;

1788.

*Shepherd*, and *Cooke*, who were to have argued in support of it, said that the point had been determined in the case of *R. v. The Inhabitants of Newton Toney*, in the last Term (a).

The KING  
against  
The Inhabitants of  
ODHAM.

*Bearcroft*, *Burrough*, and *Portal*, in support of the order of sessions.

*Per Curiam.*

Rule discharged.

(a) *Ante*, 453.

### The KING against The Inhabitants of CHESHUNT.

Saturday,  
June 7th.

AT the quarter sessions for *Hertfordshire*, *Eliab Breton*, of the parish of *Cheshunt*, appealed against a rate or assessment made for the relief of the poor of the parish of *Cheshunt*, alleging that he was aggrieved by being over-charged therein in respect of the house and lands which he occupied in that parish; and the sessions ordered that he should be relieved, by being charged in the said rate or assessment at the rate of 21 *l.* a year, instead of the sum which he then stood charged with; and that the said rate or assessment should be amended accordingly.

Where a person is over-charged in a poor rate, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him, under the 17 Geo. 2. c. 38.

A rule was obtained on a former day to shew cause why the order of sessions should not be quashed, on the ground that the sessions could not relieve the appellant without altering the whole rate; and that the sessions should have quashed the whole rate, on the authority of *The King v. The Churchwardens and Overseers of Maddern* (a), where the name of an inhabitant had been omitted, which the sessions added on appeal. But on this day, without argument,

*The Court* said that the case of *The King v. Maddern* could not govern the present, because that was just the reverse of this. There a person had been omitted in the rate; here an occupier was over-charged. They were therefore clearly of opinion that there was no necessity for the sessions to quash this rate; that

(a) *Ante*, 1 vol. 625.

they



1788.

The KING  
against  
The Inhabi-  
tants of  
CHESHUNT.

they had acted properly in amending it; and that the statute 17 Geo. 2. c. 38. would be nugatory, if it did not apply to a case like the present.

Rule discharged.

*Erskine* was to have argued in support of the order of sessions.

*Garrow* against it.

Saturday,  
June 7th.

The KING against The Inhabitants of ST. PHILIP  
in BIRMINGHAM.

If a servant hired for a year give warning eight days before the expiration of the year to leave his master at the end of the year, and the master discharge him on the same day, paying him his full wages, the servant being willing to stay till the end of the year, the contract is not hereby dissolved, so as to prevent the servant's gaining a settlement, but the discharge is merely a dispensing with the remainder of the service.

**SUSANNAH BROOKES**, the pauper, was originally settled in the parish of *Birmingham*; but subsequent to her settlement there she was hired for a year to one *Elizabeth Poole*, in the parish of *Powick*. She entered on such service, and served till within eight days of the end of the term, when, on account of some difference between them, she gave her mistress warning that she would leave her service at the end of the year. The mistress, on having hired another servant, by reason of some impatient behaviour of the pauper, discharged her from the service, but paid the pauper her full wages. The pauper accepted the wages, and accordingly quitted the service, and left the parish eight days before the year ended; but she said she would have served her year if her mistress would have let her. She was removed by an order of justices from *Powick, Worcestershire*, to *St. Philip in Birmingham*; and the sessions, on appeal, confirmed the order.

*Bower* and *Welsh*, in support of the order of sessions. The question is, whether, under the circumstances stated in the case, the service for the last eight days was dispensed with by the mistress; or whether the contract was dissolved by the mutual consent of the mistress and servant. They admitted that if the servant depart for any reasonable cause, as in *R. v. Islip (a)*, where he went to a statute fair three days before the expiration of the year, though against the master's consent, the wrongful act of the master in refusing his assent to so reasonable a request shall not prevent the servant from gaining a settlement. Or if

(a) *Eort.* 301.



a master fraudulently discharge a servant just before the expiration of the year, with a view of defeating his settlement, as in *Eastland v. Westborsley* (a), that likewise will not defeat the settlement. But where there is an acquiescence on the part of the servant to quit the service before the end of the year, at the instance of the master, in such case the contract is considered to be dissolved by mutual agreement; and the servant cannot gain a settlement. In *R. v. Gresham* (b), where the master insisted on turning away his servant, and threw down his wages, which the other took up and then went away; the court held that the taking up of his wages amounted to an assent on his part to the dissolution of the contract. So in the present case, the assent of the servant to the dissolution of the contract equally appears from her accepting her wages and actually quitting the service. This case is distinguishable from that of *The King against St. Bartholomew* by the *Exchange* (c), where, though the whole wages were paid, and the servant quitted the service by consent a week before the end of the year, the court held that a settlement was gained; for there were several other circumstances in that case which do not exist in the present, and the court seemed to lay great stress on the circumstance of the master's giving the servant half a guinea, which they considered in lieu of board-wages for that week. But here the relation of master and servant was absolutely put an end to eight days before the end of the year. The fact stated in the case that the servant would have served the whole year, if her mistress would have permitted her, does not vary the question; for it does not appear that she insisted on staying, as in *Eastland v. Westborsley*, or even that she made any offer to stay. Neither can the circumstance of the whole wages having been paid make any difference, because the contract was dissolved before the end of the year. *R. v. Castlechurch* (d).

*Beacroft, contra.* The principle on which this case must be determined is laid down by Lord Mansfield in the case of *The King v. St. Bartholomew* by the *Exchange*, where he took a distinction between exceptions in the contract, and dispensations with the service. If the case be of the latter description, and it be *bona fide*, a settlement may be gained by the servant, notwithstanding he is not in the actual service of his master the whole year. But there cannot be a dissolution of the contract without

1788.

The KING  
against  
The Inhabitants of  
St. PHILIP in  
BIRMINGHAM.

(a) *Bott.* 312.(b) *Ante*, 1 vol. 101.(c) *Cald.* 48.(d) *Burr. S. C.* 68.



1788.

The King  
against  
The Inhabi-  
tants of  
St. Philip in  
BIRMING-  
HAM.

the consent of both parties. Now that was not the case here: but on the contrary it is stated that the servant was willing to have stayed till the end of the year, if her mistress would have permitted her. The circumstance of her giving her mistress warning to leave her at the end of the year is an additional proof that she meant to stay till that time. And the impatient behaviour of the servant was not a sufficient ground to discharge her before that time. The facts therefore, in this case, only amount to a dispensation of the service by the mistress, and will not prevent the servant from gaining a settlement.

*Silvester* was to have argued on the same side, but was stopped by the court.

ASHHURST, J.—This was not an absolute dissolution of the contract. For though it be true that an agreement between the master and servant, before the expiration of the year, to put an end to the service will defeat the settlement; yet if it be not a voluntary agreement between the parties to put an end to the contract, as if the master fraudulently turn away the servant with a view of preventing his gaining a settlement, or wrongfully discharge him before the end of the year, that will not defeat the servant's settlement. Now in the present case, I think that this was a mere wrongful act of the mistress, which was *submitted to*, but *not agreed to*, by the servant. It appears by the case that the mistress, on account of the servant's behaviour, turned her away, but paid her the whole wages, on which she went away. But we cannot infer from that, that it was by agreement; for something should have been stated in the case to shew that it was voluntary on the part of the servant, and that she consented to a dissolution of the contract. But as far as we can collect from the case, it is to be inferred that the servant went away rather in consequence of the wrongful dismissal by the mistress, than by her own consent; for she was desirous of serving the whole year. On the whole I am of opinion that this must be considered as a dispensation with the service; and that the pauper gained a settlement in *Birmingham*.

BULLER, J.—This is one of the clearest cases of a dispensation with service to be met with, whether the conduct of the servant, or that of the mistress, be considered. For it appears that neither of them thought that she could put an end to the service. The servant first was desirous of going, and gave her mistress warning that she would leave her at the end of the year, because  
she



she was conscious that she could not go till that time. Then the mistress wished, for her own accommodation, to dismiss the servant before the end of the year; but she was convinced that she could not dissolve the contract before the end of the year, and therefore paid the servant the whole year's wages. This was dispensing with her service for the rest of the time. The case of *The King v. The Inhabitants of Gresham* is clearly distinguishable from the present. There, after the pauper had been in service a quarter of a year, his master insisted on turning him away, and threw down 15s. which was all that was due at that time, and this the servant accepted, and then went away. There the contract was clearly put an end to: and if so, it could not be revived again by any subsequent agreement; for when the pauper returned, it was under a new contract; and it appears that the pauper thought himself at liberty in the mean time.

GROSE, J.—It is clear that, if the servant be turned away by the wrongful act of the master before he has served the year, it will not prevent the pauper's gaining a settlement. Now, here this is either the wrongful act of the mistress, or it is a dispensation with the service. The case of *The King v. Gresham* is distinguishable from the present, for the reasons given. This is more like the case of *R. v. The Inhabitants of Richmond (a)*, where the pauper left his service thirteen days before the expiration of the year, at his master's request, but received his whole wages: and it was held that he gained a settlement by such service.

Rule absolute.

(a) *Burr. S. C.* 740.

The KING *against* The Inhabitants of St. ANDREW  
HOLBORN.

Saturday,  
June 7th.

TWO justices removed *Mary Robinson* from *St. Catharine Creechurch* in *London*, to that part of the parish of *St. Andrew, Holborn*, which lies above the bars, in the county of *Middlesex*: on appeal the sessions confirmed the order of justices, subject to the opinion of this court on the following case;

*Mary Robinson* in *June 1782* was settled in that part of the parish of *Saint Andrew, Holborn*, which lies above the bars, in the county of *Middlesex*, by hiring and service. About the

service is sufficient to give him a settlement.

latter

1788.

The KING  
*against*  
The Inhabitants of  
St. PHILIP in  
BIRMINGHAM.

If a servant hired at yearly wages be discharged four or five days before the end of the year, upon the master's becoming bankrupt, and receive the full year's wages, the



1788.

The KING  
against  
The Inhabi-  
tants of  
St. ANDREW,  
HOLBORN.

latter end of the same month, or the beginning of the month following, she was hired as a nursery maid by Mrs. Potter, the wife of Christopher Potter, of Saint Margaret, Westminster, at the yearly wages of eight guineas; she continued in the said service till within four or five days of the expiration of a year, when her master becoming a bankrupt, and the messengers taking possession of the house, her mistress discharged her, paying her the whole year's wages.

This case standing next in the paper to that of *St. Philip, Birmingham*, it was not argued, the court being clearly of opinion that the bankruptcy of the master did not dissolve the contract of hiring without the servant's consent; and that the pauper gained a settlement in *St. Margaret, Westminster*.

Both orders quashed.

Saturday,  
June 7th.

The KING against The Inhabitants of LLANGAMMARCH.

Where the farm was rated and the landlord paid the rate, and was allowed it by the tenant, the tenant did not gain a settlement, it being stated that the overseer did not know that the tenant resided there.

THE pauper was removed from *Llanwrtyd* to *Llangammarch*, and in support of the order of justices it appeared to the Sessions that the pauper in May 1778 rented a house and lands in *Llangammarch* at 5*l. per annum*; no agreement was then made between the landlord and tenant about payment of taxes. The house is called *Bryn Frwst* or *Waynllwyd*, and the land is rated to the poor's tax in *Llangammarch* by the name of *Waynllwyd*. He lived one year in the house, but paid no taxes for it. In September 1778 the landlord informed the pauper that taxes were wanted for his land. The pauper desired his landlord to pay them, and that he would repay him the same. In fact no taxes were ever paid by, or demanded from, the tenant; but it appeared that the landlord paid the taxes, and that the pauper allowed them. The overseer of the poor of *Llangammarch*, who received the taxes from the landlord for this land, knew nothing of the pauper; nor did he know whether or not the pauper resided at this farm at the time. The court of Sessions apprehending that the tenant was properly rated, and had paid the taxes in such a manner as to gain a settlement, confirmed the order of the justices.

A rule having been obtained to shew cause why the order of sessions should not be quashed,



*Bower* and *Leycester* now shewed cause. In order to gain a settlement by paying the parish rates, it is necessary that the party should both be charged to, and pay, the rates. Now in the present case both those circumstances are to be collected. As to the first; it is not necessary that the occupier should be rated *by name*; if the house itself, or the occupier of it generally, be rated, it is sufficient. In *R. v. Painswick* (a), the tenant gained a settlement by paying taxes under this assessment, "*Thomas Clifford or tenant*." *Foster*, J. held it a sufficient notice to the parish, though the tenant were not particularly and expressly named by his own proper name. *Wilmot*, J. held it to be equivalent to naming him; for he said that it was not necessary that he should be expressly named. And *Denison*, J. thought that rating the house only might be sufficient. Rating "the occupier of *Hoscoe's* tenement" (b) was held a sufficient designation of the party. So also "late *Lowbridge's* house" in *R. v. Walsall* (c), where *Aston* J. said "it is clear that the name of the occupier need not be inserted in the rate." The fact stated in the case, that the overseer did not know the pauper, cannot make any difference; it is sufficient if he were known by the parish to be the occupier of this house. Then as to the payment: this was a substantial payment by the pauper; for though it was made by the hands of the landlord, it was allowed to him by the tenant. And it would be a great hardship if payment by any other person would prevent the occupier, who is rated, and who really allows the rate, from gaining a settlement.

*Caldecott*, *contra*, was stopped by the court.

ASHHURST, J.—The circumstance stated in this case, that the overseer did not know the pauper, nor whether he resided on this farm, distinguishes it from the cases cited. The ground of the determination in *R. v. Painswick* was the notoriety of the occupancy. For when Mr. J. *Denison* thought that rating the house only might be sufficient; he added "For the parish could not but know who was the occupier." That indeed is the natural presumption: but we cannot presume against the facts of the case; and here it is expressly stated as a fact that the overseer knew nothing of the pauper, or whether he resided at this farm. The reason why a party gains a settlement by paying taxes is, because it is an admission by the parish that he is an inhabitant of that parish. There is no foundation for the

1788.

The KING  
against  
The Inhabitants of  
LLANGAM-  
MARCH.

(a) *Burr. S. C.* 465.(b) 8 *Mod.* 38. cited in 2 *Burr.* 1062.(c) *Cald.* 35.



1788.

The KING  
against  
The Inhabi-  
tants of  
LLANGAM-  
MARCH.

distinction which has been taken between the knowledge of the overseer, and that of the parish at large; for the overseers are the trustees for, and transact the business of, the parish, and they ought to know the state and condition of the inhabitants. And indeed if we could presume either way, it would rather be that the parish even did not know that the pauper resided in this farm.

BULLER, J.—The poors rate is a tax on the occupier. If therefore the house be rated, it is *prima facie* a rate on the occupier, but it is not conclusive; then it is necessary to look at the facts in the case. If the overseer call on the occupier for the rate, and he pay, that shews that he intended that he should pay. But here it is expressly stated that the overseer did not know that he was an inhabitant; and it is also stated that he went to the landlord, and received the rate from him.

GROSE, J. of the same opinion.

Rule absolute.

### RADCLIFFE against D'O'LY.

Saturday,  
June 7th.

An action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor. The statutes of the church of Ely provide that the receiver shall require the prebendaries to repair their houses when necessary, and upon their default repair them at their cost; But the materials are to be supplied out of the funds belonging to the church, and the charges of the workmanship only are to be borne by the prebendaries: On a question whether a succeeding prebendary should recover against his predecessor the full estimate of repairs wanting, or the amount of the workmanship only, the court thought it reasonable that he should recover the amount of the workmanship only; and held that the church were still bound to supply the materials.

THIS was an action on the case for dilapidations tried before Ashburst, J. at the last assizes for the county of Cambridge, when a verdict was found for the plaintiff with damages 167*l.* subject to the opinion of the court on the following case;

King Henry VIII. after the dissolution of the monastery of Ely, by letters patent dated the 10th of September 1541, founded and endowed a deanery and eight prebends in the cathedral church of Ely, and assigned mansion-houses to the dean and prebendaries. The defendant held one of the said prebends for fifteen years, and was during that time seised of the prebendal house thereunto belonging with the appurtenances: and on the 27th February 1787 the defendant resigned the said prebend, and was succeeded therein by the plaintiff. At the time of the said resignation the said prebendal house with the appurtenances was out of repair, and the sum necessary to put the same into tenantable repair was 167*l.* of which sum the materials would cost 116*l.* and the workmanship 51*l.* King Charles the Second

by



by letters patent of the 18th year of his reign, and in the year 1666, gave to the chapter of *Ely* a body of statutes [Prout, &c. (a)]; The 16th chapter of which provides as follows; De officio receptoris. Statuimus ut qui ad officium receptoris adsumitur omnes pecunias et redditus terrarum et tenementorum, et debita omnia ad ecclesiam nostram pertinentia, colligat et recipiat; et stipendia omnia prout in statutis nostris assignantur tempore suo numeret et solvat, tam quæ singulis anni terminis omnibus numeranda sunt, quam quæ sub anni exitum pro dividendi sunt solvenda; receptoris etiam cura erit omnibus dictæ ecclesiæ bonis diligenter prospicere ædificiorumque externorum ruinis necessariis reparationibus opportunè succurrere, et terras ac tenementa visitare. Ad eundem pertinebit facta tecta templi facere et domos omnium ministrorum ecclesiæ nostræ, præterquam decani et canonicorum, cum consilio decani, aut eo absente, vicedecani resarcire, et restaurare, quoties illorum necessitas postulaverit, et quicquid ad templi et chori ornatum necessario pertinebit comparandum providere, *materiam præterea et lignum ædificationi aptum diligenter servandum curabit*; prospiciat etiam ædificiis decani et canonicorum, quæ si moniti non resarciant, *ipse illorum stipendio resarcienda curabit*. Porro ut decani et canonicorum ædes melius diligentiusque in posterum reparentur, statuimus ut *materiam quamcunque necessariam reparationi prædictæ ecclesiæ suppeditet* iudicio decani et receptoris; *expensas vero operis totius* circa hujusmodi reparationes *decanus* in ædibus suis reficiendis et *canonici singuli* pari ratione in eorum ædibus reparandis sumptus facient: curam denique habebit sacrarii, vasibus etiam vestibisque sacris, et monumentis omnibus haud negligenter servandis operam dabit; quæ omnia sese fideliter et diligenter observaturum, tactis sacrosanctis Evangeliiis, coram iis, qui ipsum elegerunt, jurabit. Is ab ecclesiâ pro officii administratione decem libras percipiet.

This body of statutes has been acted under by the chapter ever since the time that the same was given; and the several members of the church take an oath to observe them at their admission; and as to the prebendal houses in particular, they have been usually repaired in the manner pointed out by this chapter.

No application has been made to the dean or treasurer for any materials or allowance in respect of the repairs in question by

(a) The preamble recited that *Henry* the Eighth had given statutes.



1788.

RADCLIFFE  
against  
D'OYLY.

either the plaintiff or the defendant; nor have any materials been provided, or allowance made towards the same.

The question for the opinion of the court is, whether the plaintiff is entitled to recover, and how much. If the plaintiff is not entitled to recover, then a verdict is to be entered for the defendant. If the plaintiff is entitled to recover for the value of the workmanship only, then a judgment is to be entered for 5*l*. If the plaintiff is entitled to recover for both workmanship and materials, then the verdict is to stand.

*Wilson*, for the plaintiff, contended, first, that a prebendary as such is liable by the general law to the same suits for dilapidations as any other ecclesiastical person. And, secondly, that the statutes by which the church of *Ely* is regulated make no alteration in the common law right. As to the first, the reason of the liability equally applies to all ecclesiastics; it is but reasonable that he, who has the use and enjoyment of the house, ought to repair it. Indeed if there be any difference, the reason is stronger against a prebendary, because he has less duty to perform than other ecclesiastics. There is no case in which this question has come immediately in point in a common law court: but the constant course of pleading, which has been adopted in actions of this nature, is a strong circumstance to prove the liability of prebendaries to repair. In *Lutw.* 116, 117. are two precedents of declarations, on which judgment was given, which were actions against vicars for dilapidations; and they state that all *prebendaries*, rectors, vicars, &c. are bound by law to repair, &c. In *Dr. Sand's* case (a), on an application for a prohibition to the spiritual court to stay the proceedings there in a suit for dilapidations against a prebendary of *Wells*, it appeared that there were eight prebends, and eight prebendal houses, belonging to that church, but no house in certain was allotted to each prebend, the bishop having the privilege of assigning to each what house he chose. It was objected that the house in question was not part of the prebend; but the court held that when the bishop had assigned a house, it became part of the prebend, and that the prebendary was liable to a suit for dilapidations. As therefore the court refused to grant a prohibition, there is no reason why a prebendary should not be liable in a common law court. Secondly, If then the defendant be bound by the general law to the repair of the prebendal house, it is incumbent on him to

(a) *Skin.* 121.



shew that the provisions of the common law, and also the suit in the spiritual court, for dilapidations are taken away with respect to the church of *Ely* by the statutes. From the time of *Hen. 8.* till the reign of *Charles* the Second the church of *Ely* was in the same situation with all other churches; and every prebendary thereof might have brought an action against his predecessor for dilapidations. Then if it had been intended to take away such a right by the statutes given in the reign of *Charles* the Second, the framer of them would have expressly taken away that right: but he has not done so; and such a right is not to be taken away by implication. The usage stated in this case may be laid entirely out of the question; for it is only stated that the prebendal houses have been usually repaired in the manner pointed out by the latter statutes, which still leaves the question open, what is the construction of those statutes. But whatever construction may be given to them as between the incumbent and the church, they were not intended to take away the common law right which the successor has against his predecessor for dilapidations. The object of these statutes was only to apply more particularly the law of *Othobon*, made in the reign of *Henry* the Third, for compelling ecclesiastical persons to repair their houses. 2 *Burn's Ecc. Law.* 129. For they provide that the treasurer shall warn the dean and prebendary of his house being out of repair, and order it to be repaired if the prebendary neglect it, and that the expence shall be deducted out of his salary. The statutes do not speak of any benefit to be given to the dean and prebendaries. The recital to the statutes is, that the houses may be the more speedily repaired; and for that purpose it declares that a stock of materials shall always be provided fit for immediate use. But that only means that the dean and chapter should order the work to be done, but that the expence should be borne by the person for whose benefit it was done. For the expression "*expensas vero operis totius*" means *the whole expence*, and not merely the *workmanship*; so that though the church was always to have the materials ready for the repairs, yet the expence was to be entirely borne by him whose house was repaired. But even if it were intended to give some advantage to the prebendary, not only in the first instance, but ultimately, still that is only an advantage which, like all others, may be waved: but the common law obligation still remains. This advantage might have been taken by the

1788.

RADCLIFFE  
against  
D'OYLY.



1788.

RADCLIFFE  
against  
D'OYLY.

defendant during his incumbency, but his waving that advantage does not make him less liable to his successor, who has a right to find the house in complete repair. At all events this provision does not apply to the case of a vacancy; the words "*ipse illorum stipendio refarcienda curabit*" only relate to repairs during the incumbency; otherwise the expence could not be deducted out of the salary. And as the statutes give an encouragement to repair immediately, if the prebendary neglect to take advantage of it at the time, so far from its excusing him from any obligation, he is the more culpable. And as by the common law a prebendary has a right to find his house in repair, and to have the quantum of dilapidations estimated by a jury, a contrary construction of these statutes will subject him to the inconvenience of having those damages estimated by the dean and chapter: besides it is a mutual advantage; both parties have a right to have that quantum ascertained by a jury.

*Graham*, for the defendant. First, This action does not lie against the defendant as a prebendary of the church of *Ely*. Secondly, But if it does, the plaintiff can only recover damages in this case to the amount of the workmanship. First, No case can be found in which an action by a prebendary against his predecessor for dilapidations has been entertained in a court of law. The cases, which have been cited to prove this position, are not adequate to the purpose for which they were produced. They are actions against vicars; and the bare recital in those declarations of the law that prebendaries are bound to repair is not sufficient. In *Jones v. Hill* (a) it was even doubted by *Pollexfen*, and *Ventris*, J. whether such an action as the present lay against the parson or vicar for dilapidations, who were of opinion that the only remedy was in the spiritual court; but when it was argued a second time, judgment was given for the plaintiff, *Pollexfen* and *Ventris*, J. being then dead. But no case has ever extended the common law action to prebendaries. And there is not the same reason for allowing this action against prebendaries as against rectors and vicars, for they are in their nature more like the fellows of colleges, whose houses and chambers are repaired by the corporation. And there is an additional reason in this case why a prebendary of this church should not be liable, because special provision is made for the repair of the prebendal houses by the constitutions of the church. This church was raised out of the



spoiled ruins of the monastery of *Ely* by King *Henry* the Eighth. Now it was undoubtedly competent to him to annex such conditions to the church as he pleased. And it appears that *Henry* the Eighth gave a code of laws for the regulation of the church, which being found insufficient for all purposes, a new set of statutes was given in the reign of *Charles* the Second, which makes a specific provision for all the purposes of repairs. Under these statutes it was the duty of the receiver to inspect the prebendal houses, to see what repairs were necessary, and to provide such materials as were proper in the judgment of the dean and chapter. This shews that the dean has a general superintendence over the buildings of the church; and when the repairs are finished, if the prebendary for whose use they were made does not pay, the receiver is empowered to deduct the expence out of the stipend allotted to him. Therefore, if the dean and receiver had discharged their duty during the late incumbency, this case could never have arisen; for they might have compelled the late prebendary to repair by deducting the expence out of his stipend. But though they have lost that opportunity, it does not follow that the plaintiff cannot still compel them to repair. If so, he will not sustain any injury by not recovering against the defendant; the dean and chapter must suffer for their neglect; they must now order these repairs to be paid out of the general fund of the church, instead of deducting it from the stipend of the late incumbent. Secondly, If the plaintiff has his common law remedy, at least it is so far taken away by the statutes of the church of *Ely* as respects the value of the materials necessary for the repairs. The construction of the passage "*expensas vero totius operis &c.*" cannot be supported; for "*opus*" as opposed to "*materia*" can only mean *workmanship*. And if the court should determine that the defendant is liable for the materials as well as the workmanship, this inconvenience would follow; either the dean has a discretionary power of supplying those materials, or it is compulsory on him to do so. If the former, knowing that a common law action might be maintained against the former incumbent, the dean would in every instance refuse to supply the materials, and drive the party to his common law remedy; the consequence of which would be that the fund allotted to the repairs of the prebendal houses would go to an accumulation of the fund of the society; and as by one of the statutes certain stipends are allotted to the prebendaries,

1788.

RADCLIFFE  
against  
D'O'LY.



1788.

RADCLIFFE  
against  
D'OYLY.

and the surplus of the fund is directed to be divided in moieties between the dean and the prebendaries, it would be an inducement to the dean to refuse to do his duty, as he would derive an advantage from that accumulated fund. If it be compulsory on the dean, then, notwithstanding the judgment of this court against the defendant for the whole expence, the plaintiff would have a right to call on the dean for the allotment of the materials, who would be bound to furnish them; and thus the plaintiff would recover a double satisfaction.

*Wilson*, in reply, was desired by the court to confine himself to the second point. As to the plaintiff's recovering a double satisfaction; if the provisions in the statute apply only to the case of an incumbency, and not to a vacancy, the dean need not pay any attention to any application which the plaintiff may make after he has obtained the judgment of this court against the defendant for the whole expence. But even if the dean were to allow the necessary materials to the plaintiff after the judgment of this court in his favour, the plaintiff must then be considered as a trustee for the late incumbent, and would be answerable to him for the amount of what he so received.

ASHHURST, J.—With respect to the law of this question, namely, whether an action on the case will lie against a prebendary for dilapidations, I cannot entertain any doubt about it. The form of declarations in these kind of actions is very material in a case where no direct determinations can be found one way or the other; for the form of legal proceedings is evidence of what the law is. And we find the form to be in this case that all prebendaries, rectors, vicars, &c. are bound by law to keep their houses in repair. And indeed it is an obligation on them both in point of morality and of policy, that their successors should not suffer by the neglect of their predecessors; and therefore the late incumbent, or his executors, must make good to the successor any damage which he may thus sustain. The only question then is, supposing this to be a general obligation in law, whether there is any thing particular in this case, on account of the provisions in the statutes of the church of *Ely* relative to the repair of their buildings, which takes it out of the general rule. Now the statute, which directs the dean and chapter to provide the necessary materials for the repairs, may operate on the discretion of the court as to part of this demand. There would indeed be no hardship on the defendant, if he were obliged



1788.

RADCLIFFE  
against  
D'OYLY.

obliged to make amends for the whole; for it was owing in part to his neglect that his house was out of repair: but, however, there was a neglect in other parts of this body, namely, the dean and the receiver, whose duty it was under these statutes to attend to the repairs of the prebendal houses. Therefore there is no reason why they, who have been guilty of this neglect, should be excused from contributing what they were bound to do; so that the true justice seems to be that the plaintiff should recover against the defendant the amount of the workmanship, and that the dean and chapter should furnish the necessary materials.

BULLER, J.—The first question is, whether there is any distinction in point of law between a prebendary and any other ecclesiastical person, as to his liability in this sort of action. I am clearly of opinion that there is not. The two cases cited from *Eutwyche* are very material; for precedents, which have prevailed for a century past, are strong to shew what the common law is; and in those it is stated that prebendaries, as well as rectors, &c. are bound by law to repair. And with regard to the case in *Skinner*; though that was only a suit in the ecclesiastical court, yet it is a strong authority in this case: for there is no difference whether the proceedings for dilapidations be in the common law, or the spiritual, courts; though the remedy in the former is more effectual. It is certainly true, as the defendant's counsel has stated, that in times past a considerable doubt had been entertained whether this sort of action could be maintained at all against any ecclesiastical persons. But the action is now grown into common use; and since the time of *Levinz* it has not been doubted but that the action lay against prebendaries as well as against any other ecclesiastics. And there is no distinction whether the action be brought against the executor of the former incumbent, or against the former incumbent himself, who has other preferment. The next question then is, whether under these statutes the plaintiff is entitled to recover the full amount of the expence which he will be put to by reason of the house being out of repair, or only the amount of the labour. Now it seems to me that it will be a very lenient determination for the defendant, if we only allow to the plaintiff the amount of the workmanship: for I think it is a considerable doubt whether the effect of the statute in question is any thing more than that of a provision in a lease that the tenant shall



1788.

RADCLIFFE  
against  
D'OILY.

repair, the lord finding timber; if the tenant apply for the timber, the lord must allow it; but the not providing the timber is no answer to an action brought for not repairing, if no application be made by the tenant before the action is brought. Now here there is a particular fund for the materials. The first thing, directed to be done by the statutes, is that the receiver shall examine the houses of the dean and prebendaries, and see what repairs are wanting; and if they do not repair, when called upon, the receiver is to order the repairs, and to deduct the expence of it out of their stipends; and then the statute provides that the materials shall be found by the church, such as shall be thought necessary in the judgment of the dean; and therefore they should have required the defendant to repair during his incumbency. But I agree with my brother *Aspburst*, that the plaintiff may now call upon the dean and the receiver to supply the materials; for no time is limited within which the application is to be made; the words of the statute are general; neither is there any distinction taken between the cases of a vacancy and incumbency. As therefore the church has been guilty of a neglect, it is not reasonable that they should be excused from furnishing the materials out of the fund appropriated for the purpose. And it will be no answer for them to say that the plaintiff is entitled to recover for dilapidations either in the spiritual, or common law, courts; for it must be considered against whom he is entitled to recover: and if the dean and chapter furnish the materials necessary for the repairs, he will have no right to call on the predecessor for the amount of those materials.

GROSE, J.—I have no doubt but that this action may be maintained against a prebendary as well as against any other ecclesiastical person. But the statutes, by which the church of *Ely* is governed, make a difference in this case. They direct that the receiver shall examine the buildings belonging to the dean and prebendaries, and give them notice to repair, providing the "*materiam necessariam*." There is a difference between the expence of repairing the church itself, and the prebendal houses; in the one case the whole expence is to be borne by the dean and chapter, in the other they are only to provide the materials. Therefore as it is the duty of the receiver, as soon as he perceives any house to be out of repair, to supply the necessary materials, the incumbent in possession has no excuse for not repairing. And though



though the receiver did not offer the materials in this case, yet the incumbent might have applied for them, and the dean and chapter were bound to furnish them. And as the present incumbent is still entitled to those materials to which his predecessor had a right, I am of opinion that the plaintiff should only recover against the defendant the amount of the workmanship.

Verdict to be entered for the plaintiff for £.51.

CECIL *against* BRIGGES, Bart.

The same *against* the same.

**M**ANLY obtained a rule to shew cause why these two actions should not be consolidated, because they were both in *assumpsit*; the causes of action arose in the same county; the writs in both actions were sued out on the same day, and the defendant had been held to bail in both. The rule likewise called on the plaintiff to shew cause why he should not pay the costs of this application.

*Lane* now shewed cause, insisting that it was not necessary that the plaintiff should in all cases consolidate his several causes of action, though they were of the same nature, and accrued at the same time: for although his witnesses to prove one contract might be able to attend the first assizes, yet perhaps a material witness to prove the second cause of action might be absent. Such an application was never made before; and the court will not readily grant the present, inasmuch as it will unnecessarily throw a difficulty in the plaintiff's way of pursuing his right of action. At all events, however, the latter part of the rule, respecting the costs, must be discharged. But

*The Court* said, that, as by the rules of law, the plaintiff might have comprised both his causes of action in the same declaration, it was oppressive to sue out two writs at the same time. That the possibility of this rule being attended with any inconvenience to the plaintiff was no answer to this application; because if any special reason, why these two actions should not be consolidated, had existed, the plaintiff ought to have shewn it. And no inconvenience would arise, even if the fact were as the plaintiff's counsel suggested, namely, that all his witnesses might not be ready

1788.

RADCLIFFE  
*against*  
D'O'LY.

Monday,  
June 9th.

If two actions are brought by the same plaintiff at the same time for causes which may be joined, and the defendant is holden to bail in both, the court will compel the plaintiff to consolidate them, and to pay the costs of the application.



1788.

Ciccu  
against  
BRIGGES.Monday,  
June 9th.

If *A.* be bound with *B.* as a surety for the payment of a sum certain, and take an absolute bond from *B.* payable the day before the original bond will become due, and *B.* become a bankrupt before the day of payment, *A.* may prove this debt under the commission, and *B.*'s certificate will be a bar to an action by *A.* on the counter bond, though *A.* does not pay the original bond till after *B.* has committed an act of bankruptcy.

ready at the assizes, because he might apply to put off the trial on that ground. And as they were of opinion that it was an oppressive kind of proceeding, they made the

Rule absolute with costs.

## MARTIN against COURT.

**D**EBT on bond dated 6th July 1786. The defendant, after craving oyer of the bond and of the condition, which was, that if the above bounden *Richard Frankcombe*, and *Charles Court*, or either of them, &c. should pay to the plaintiff or his executors, &c. 401 *l.* with lawful interest, on the 4th of July 1787, without fraud or further delay, then the obligation to be void; pleaded, that before the exhibiting of the bill of the plaintiff (to wit) on the 17th of April 1787, at *Westminster*, &c. he became a bankrupt within the true intent and meaning of the statutes made and then in force concerning bankrupts; and that the cause of action, in the declaration mentioned, accrued to the plaintiff before the time when the defendant as aforesaid became a bankrupt; whereupon issue was joined. At the trial at the Sittings after last *Easter Term* at *Westminster*, before *Buller, J.* a verdict was found for the plaintiff, subject to the opinion of the court on the following case.

The plaintiff, the defendant, and one *Richard Frankcombe*, entered into a bond to *William Leak* on 5th July 1786, conditioned for the payment of 401 *l.* and interest thereon, on the 5th of July 1787, being for the debt of the defendant. On the 6th of July 1786, the defendant entered into a bond with the condition stated in the plea; upon the back of which bond was indorsed the following memorandum; "The within bond is given and executed by the within bounden *Richard Frankcombe*, and *Charles Court*, to the within named *Henry Martin*, to indemnify him for having on the 5th day of July instant, at the request of, and for the proper debt, of the within named *Richard Frankcombe* and *Charles Court*, entered into and executed a joint and several bond to *William Leak*, for the payment of the sum of 401 *l.* and interest on the fifth of July 1787. Dated this 6th of July 1786." The first money paid by the plaintiff on the original bond was on the 17th August 1787. The defendant became a bankrupt on the 17th April 1787, and has since obtained his certificate. The question is, whether the plaintiff is entitled to recover.

Baldwin



*Baldwin* for the plaintiff. As it appears by the case that the plaintiff, who was the defendant's surety, was not damnified till after the defendant's bankruptcy, he could not prove this debt under his commission, and consequently he may maintain this action. *Tully v. Sparks*, Str. 867. *Goddard v. Vanderheyden*, 3 Wils. 262. *Taylor v. Mills*, Cowp. 525. and *Alfop v. Price*, Dougl. 155.

1788.

MARTIN  
against  
COURT.

*Smith*, for the defendant, observed that the cases cited did not apply to the present, because the memorandum indorsed on the bond could not be considered as part of the condition. It does not appear whether the memorandum was written at the time of the execution of the bond or afterwards; if the latter, it would not make part of the original transaction. But even if it were indorsed at the time, yet as the defendant craved oyer of the condition, and this was not set out, it must be taken to be no part of the condition because it is not set out on the record. The plaintiff is estopped from considering this as part of the condition, and therefore cannot have the advantage of it. *Salk.* 498. 6 *Mod.* 237. *S. C.*

*Baldwin* in reply. It appears from the case of *Alfop v. Price* that the parties may go to trial on the general plea of bankruptcy, and give the special matter in evidence. By the 5 *Geo.* 2. c. 30. s. 7. the plea must conclude to the country; so that the plaintiff could not reply any special matter; he could only add the similitur. This plea then opened the whole merits: and it is found by the case that the memorandum is dated on the same day as the bond, and therefore must be taken as part of the same transaction.

The Court were of opinion that the plea of bankruptcy opened the whole merits of the case; and that this case fell within the principle of *Toussaint v. Martinnant* (a).

ASHHURST, J. Here the plaintiff admitted himself to be the debtor of the obligee in the original bond for a particular purpose. He agreed to become a surety for the defendant, but required to be indemnified at all events, and to have a security in his hands in case he should be called upon. And this distinguishes it from the cases cited by the plaintiff's counsel, where the bond to indemnify were conditional, and the surety had not been damnified at the time of the bankruptcy. But this is an absolute bond payable to the plaintiff at all events; it was *debitum in presenti, solvendum in futuro*, and therefore he might have proved it under the defendant's commission.

(a) *Ante* 100.



1788.

MARTIN  
against  
COURT.

BULLER, J.—In the case of *Toussaint v. Martinnant*, though the plaintiff was only a surety in the original business, yet it was apparent that he would not lend his name to the defendant generally, but only for a particular time: so here the plaintiff has acted on the same principle. The dates of the different bonds in the present case are decisive. The original bond was made payable on the 5th of July 1787; but the bond in question was made payable the 4th of July; which shews that the plaintiff insisted on having the money in his own hands before he could be called upon on the other bond in which he had joined with the defendant. And as it is absolute in its form, and the plaintiff might have proved it under the commission, he is barred in this action by the defendant's certificate.

GROSE, J.—There were two ways in which the plaintiff might have indemnified himself from the consequences of having entered into the bond with the defendant. He might either have required that the money should be placed in his hands on a particular day before he could be called upon, or he might take a common bond of indemnity. If he had only taken the latter, this would have fallen within the cases cited on the part of the plaintiff: but he was not contented with that; he insisted on having the money secured to him on the 4th of July, which was before the time when he could be called upon to pay the original bond. This bond then became a debt vested at the time of the bankruptcy, which the plaintiff might have proved under the commission.

Postea to the defendant.

### MEMORANDA.

On the 4th of June LORD MANSFIELD resigned the office of Lord Chief Justice of the Court of King's Bench, having presided near thirty-two years in that Court; and was succeeded by Sir Lloyd Kenyon, Bart. Master of the Rolls. On the 7th of June Sir Lloyd Kenyon was created a Peer of Great Britain, by the title of Lord Kenyon, Baron of Gredington, in the county of Flint. On Monday, June the 9th, he was called to the degree of Serjeant at Law, was sworn into the office of Lord Chief Justice in the evening of the same day, and on Wednesday the 11th of June took his seat upon the bench as Lord Chief Justice.

On the 9th of June also Ralph Clayton, of Gray's Inn, Esq. was called to the degree of Serjeant at Law. The motto on the rings was "*Quid leges sine moribus*."

The END of TRINITY TERM.



C A S E S

ARGUED and DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Twenty-Ninth Year of the Reign of GEORGE III.

In the last vacation several promotions took place at the bar.

*Richard Pepper Arden*, Esq; the Attorney General, was appointed Master of the Rolls on the promotion of Lord *Kenyon*, and was knighted.

*Archibald Macdonald*, Esq; the Solicitor General, was made Attorney General, and knighted.

*John Scott*, Esq; was made Solicitor General, and knighted.

And *Edward Bearcroft*, Esq; was appointed Chief Justice of *Chester*, on the promotion of the late Attorney General.

OWEN *against* HURD.

ON a rule having been obtained to shew cause why an attachment should not be granted against the defendant, for a contempt in not obeying an award, it appeared that a submission to arbitration between these parties had been made a rule of court; but the arbitrator not having proceeded within the time limited, one *John Hurd* and the defendant *Robert Hurd*, who were the real parties in the cause, *Owen* being only a nominal plaintiff, had agreed to a second arbitration, which was not made a rule of court: and it was for not obeying the award made by the second arbitrator, that the attachment was moved

second arbitrator by *B.* and *C.* who were the real parties in the suit, no attachment can issue against *B.* for not obeying the award made by the second arbitrator, because the reference should be made by the parties on the record; and even if it had, there should have been another rule to make the second submission a rule of court. And as the court had no jurisdiction in this case, they could not go into the merits, though *B.* consented to wave the objection. If an affidavit be put into court without any title, the court cannot take any notice of it, though the adverse party is willing to wave the objection.

Friday,  
Nov. 7th.

A submission to an award between *A.* and *B.* the parties on the record having been made a rule of court, which award not having been made in time, the dispute had been referred to a se-



1788.

OWEN  
against  
HURD.

for. This it was contended on the part of the defendant could not be granted, inasmuch as the court could entertain no jurisdiction of a cause, which was not before them at the time by some process; and as the submission to the award was not obligatory on both parties, *John Hurd* being no party to it, the defendant *Robert Hurd* was not bound to comply with it.

*Garrow* for the plaintiff. *Baldwin* for the defendant.

*Per Curiam*: This award is a mere nullity. For, First, the reference was not made by the parties on the record, who should both have consented to the rule of court. And, Secondly, if it had, there should have been a second application to the court under the circumstances to make the submission to the second award a rule of court, and the order must have been made by the court itself; for this is an application for an attachment, as for a violation of a rule of court, when in truth there has been no rule of court violated.

The rule was therefore discharged, but without costs; on which *Baldwin* offered to wave the objection, and go into the merits, but

Lord KENYON, Ch. J. said, that could not be done; for the court were bound to take notice that they had no jurisdiction: and he remembered an instance many years ago, where there being no title to the affidavits in the cause, the Court said, they could not take any notice of them, even though the counsel on the other side did not wish to take the objection.

Friday,  
Nov. 7th.

ROE on the demise of WOOD against DOE.

An arbitrator may award costs without any express authority for that purpose. Arbitrators having power to choose an umpire may elect one before they enter upon the examination of the matter referred to them.

SEVERAL objections were taken to an award made in a cause referred to arbitration by rule of court; First, that the umpire had awarded costs without an express power so to do: in support of which was cited, 1 *Rol. Abr.* 254. Secondly, that the two arbitrators, who had the power of naming an umpire, had named one before they had entered into the examination of the subject at all.

But these, as well as the other objections upon the merits, were over-ruled by the Court: and they held, First, that the power of awarding costs, was necessarily consequent to the authority conferred upon the arbitrator of determining the cause; and that the reason why, in references of this sort, a provision was frequently



quently inserted, that the costs should abide the event of the award was, that the arbitrator might not have it in his power to withhold costs from the party who was in the right. But that was to be considered as the restriction of a power, which he would otherwise necessarily have, of allowing costs at his election. Neither was there any ground for the second objection, for it rather seemed to be the fairest way of choosing an umpire. And they said that it had been solemnly determined in this court about thirty years ago, that arbitrators might elect an umpire the instant they began to take the matter into consideration.

*Garrow* for the plaintiff. *Shepherd* for the defendant.

Rule discharged.

MALCOLM and Another, Assignees of MAYNE and GRAHAM, Bankrupts, *against* FULLARTON.

Saturday,  
Nov. 8th.

UPON a rule to shew cause why the award which had been made in this cause should not be set aside, it appeared that there had been accounts between the bankrupts and the defendant, and that the latter had paid 1500 *l.* after the bankruptcy to the plaintiffs as assignees, which was only a part of the sum they demanded. The present action had been brought to recover a further sum claimed as due from the defendant to the bankrupt's estate; to which the general issue only had been pleaded; and pending the suit, it was agreed to refer *all matters in difference between the parties in the cause* to the determination of an arbitrator, who, upon examination of all the accounts between the parties, awarded the sum of 700 *l.* to be paid by the plaintiffs to the defendant on a particular day.

And now several objections were taken to the award by *Bearcroft, Garrow, and Park*. First, that the terms of the reference only included all matters in dispute *in that cause*, and therefore that the arbitrator had exceeded his authority in awarding a sum to be paid by the plaintiffs to the defendant, no cross demand having been set off in that suit. And that it was the intention of the parties only to refer the matters in dispute

matters in dispute in that trial. Assignees of a bankrupt having received 1500 *l.* from a debtor to the bankrupt as a debt due to his estate, and having commenced an action against him for a further demand on the same account, to which he had only pleaded the general issue, agree with him to refer their differences to arbitration, and the submission is in this form, that *all matters in difference between the parties in the cause* be referred; the arbitrator has power to award that the assignees shall repay a part of the sum already received, if it appear to have been paid by mistake. The only case where a party shall be bound by the payment of money, though by mistake, is where it is paid into court under a rule.

1788.

ROB  
*against*  
DOE.

A submission to arbitration of *all matters in difference between the parties in the cause* is not confined to the subject matter in the particular action then depending, but will extend to cross demands between the parties, tho' not pleaded by way of set-off; and the costs being to abide the event makes no difference. But a reference of *all matters in dispute in the cause between the parties* is confined solely to the



1788.

MALCOLM  
and Others  
against  
FULLAR-  
TON.

*in that cause* appeared further by the agreement, that the costs should abide the event of the reference. Secondly, that the plaintiffs, who were assignees of the bankrupts, had no power of referring any other matter than the particular cause in question, without the consent of the creditors. *Ex parte Whitchurch*, 1 Atk. 91. Thirdly, that the arbitrator had awarded a *certain sum to be paid* by the assignees *on a certain day*, which he had no power to do; for at all events the defendant could only prove his debt, if it existed under the commission, and entitle himself to a proportionable share of the bankrupt's effects with the rest of the creditors.

*Erskine* and *Adam*, who were to have argued in support of the award, were stopped by the Court.

LORD KENYON, Ch. J.—The first objection which has been raised against this award, namely, that the arbitrator has exceeded his authority, would, if it were well founded, be destructive of it. But that is answered by reading the terms of the reference; by which it appears that “all matters in difference between the parties in the cause” were referred. “The parties in the cause” is merely a description of the *persons*, and not of the *subject matter* in dispute. And indeed this is the constant form of these submissions to awards, which are intended to include all matters in dispute between the parties. With respect to the latter objection, that the arbitrator has awarded a particular sum to be paid in *solido* on a certain day, instead of directing him to go before the commissioners to prove this debt: If this had been a debt due from the bankrupt to the defendant, the objection would have holden; but this debt was not contracted before the bankruptcy, for the defendant inadvertently paid a sum of money to the assignees after the bankruptcy, which it now appears was not due to them. That sum therefore could not be proved under the commission: and the arbitrator could only award that the sum which was over-paid to the assignees should be repaid by them to the defendant in *solido*.

ASHHURST, J.—I cannot conceive that any injustice has been done to the parties in this cause. The award recites, that there was an account between the parties, consisting of items on both sides, and that a gross sum was paid by the defendant to the assignees. And it now appears that part of that sum was paid on a mistake; therefore that money was received by the assignees



assignees in their own wrong; it never constituted a part of the bankrupt's estate. The defendant is of course entitled to receive that sum in gross; and if the arbitrator had awarded otherwise, he would have done great injustice.

BULLER, J.—The first question, which has been made in this case, is of very general importance, because it extends to all references, and must settle the meaning of the terms of a general reference. This question came before the court in the case of *Bridgewater v. Gandersequi* (a), where the words in the rule of reference were similar to the present. *Erskine* then contended that those words only included the matters in dispute in that cause; and that the arbitrator had exceeded his authority, in taking into consideration any other matters in difference between the parties. *Howarth*, in answer, insisted that the terms of the reference were descriptive of the parties in the cause, and not of the particular cause between the parties; and of that opinion was the Court. Here therefore is an express determination on the point. On enquiry I find that the difference in practice, where the parties intend to refer only *the cause*, or all *matters in difference* between the parties, consists in transposing the words; in the first instance the words in the rule of reference are, "all matters in difference in this cause between the parties;" and in the latter, "all matters in difference between the parties in this cause;" as in the present case. An argument has been drawn at the bar from the subsequent words, by which it is agreed that the costs should abide the event of the cause; from which it was contended that only the matters in that particular cause were intended to be referred. But I do not think that those words will warrant the conclusion which has been drawn from them; for it is well known that the costs are subject to the will of the parties; and sometimes they are referred in one form, and sometimes in another. The next question is whether the arbitrator, by his award, has infringed on the policy of the bankrupt laws, and altered the distribution of the bankrupt's effects. I am clearly of opinion that this award does not interfere with the bankrupt laws. The sum awarded to be paid by the assignees to the defendant was never paid into the bankrupt's hands; it was part of a sum paid after the bankruptcy, and the defendant could never have proved it under the commission. Then it stands

1788.

MALCOLM  
and Others  
against  
FULLARTON.

(a) *Tr. 22 Geo. 3. B. R.*



1788.

MALCOLM  
and Others  
against  
FULLAR-  
TON.

thus; money has been paid into the hands of the plaintiffs, which was not due; and only so much of it, as was due at the time, is to be considered as part of the bankrupt's estate. Therefore the arbitrator has done right in awarding the 700 *l.* to be paid by the assignees to the defendant. The only point upon which I had any doubt was, whether the defendant was bound by the payment of 1500 *l.* which he made to the assignees after they had delivered to him their account, and demanded the balance of it. But I am now convinced that he is not bound by that payment, it having been made by mistake. The only payment, by which a party is bound, is that which is made into court under a rule of court; that is a payment on record; and the party can never recover it back again, though it afterwards appear that he paid it wrongfully: but that does not extend to payments between party and party.

GROSE, J. of the same opinion.

Rule discharged.

Monday,  
Nov. 10th.

VERNON and Others, Assignees of TYLER, a  
Bankrupt, against HALL.

If the payee of a bill of exchange, received from a third person as the price of an estate, give time to the drawee on condition that he shall allow interest, and afterwards the drawee discharge the bill, having in the mean time committed an act of bankruptcy, this is not such a payment in the ordinary course of trade as is protected by the 19 Geo. 2. c. 32. and the assignees may recover the money from the payee.

**B**EARCROFT moved to set aside the verdict which had been given for the plaintiffs at the trial of this cause before Lord Kenyon, at the Sittings after the last Term at *Guildhall*. It was an action brought by the assignees to recover 570 *l.* paid by the bankrupt to the defendant after the bankruptcy. The act of bankruptcy was proved on the 2d of *May*, 1785; but it was unknown to the defendant as well as to several of her other creditors at that time. Two months prior to the bankruptcy the defendant sold an estate to one *Uterson*, who, in order to pay for it, had drawn a bill of exchange to that amount on the bankrupt, in favour of the defendant, payable the 7th of *February* in the same year: when it became due the defendant applied for it, and was told that it was not convenient at that time to pay; but if he would permit it to remain in the bankrupt's hands, she would allow him interest on it; to this he assented, and on the 22d of *May*, 1785, applied for payment, which he received without knowing of the bankruptcy. The motion for a new trial was

made



made on the ground, that, as this payment of the bill of exchange was made in the ordinary course of business, it was protected by the 19 Geo. 2. c. 32. But

*The Court* were clearly of opinion, that it was not such a payment in the ordinary course of business as came within the provisions of the statute; for they considered the transaction as a loan of money at interest, which became a debt.

Rule refused.

1788.

VERNON  
and Others  
against  
HALL.

LADBROKE against CRICKETT.

Tuesday,  
Nov. 11th.

**I**N an action of trover for a vessel called *The London*, which was tried at the Sittings after *Hilary* Term, 1788, at *Guildhall*, before *Grose, J.* a verdict was found for the plaintiff for the sum of 980*l.* subject to the opinion of this Court on a case stating, that the vessel was taken in execution on the 4th of *May*, 1787, by the plaintiff, as sheriff of *Surry*, under a *Fi. fa.* tested the 23d of *April*, 1787, issued against *George Pasmore*, the master thereof, at the suit of *Henry Pasmore*; and on the 24th of *May*, another writ, tested the 21st of *May*, 1787, was executed on the said vessel by the plaintiff, at the suit of *A. Pasmore*, against the same party. The plaintiff was served with a notice from the defendant on the 5th of *July*, 1787, whereby, after stating that he understood that the plaintiff meant to sell the vessel under the abovementioned executions, he gave him notice that he, the defendant, as marshal of the Court of Admiralty, was in possession of the same by virtue of a writ under seal of the Court of Admiralty, at the suit of *A. Atherley* and others, for a bottomry bond, in the sum of 824*l.* 8*s.* 5*d.* The judgments under which the plaintiff levied execution were of *Easter* Term, 1787. On the 8th of *November*, 1786, *George Pasmore*, who was master and owner of the vessel, executed an instrument under seal at *Cowes*; reciting, that he was master and owner, and that the vessel, in the course of her voyage from *South Carolina* to *London*, had sustained great damage, insomuch that he was

If the owner of a ship charge her for repairs done in *England* by an instrument under seal, stated to be by way of bottomry, upon which she is afterwards seized by Admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence, but between the seizure and decree a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under this writ, nor can he maintain trover against the officer in possession by

the warrant of the Court of Admiralty. If *A.* lend money on the security of a ship, and take possession before execution, executed at the suit of *B.* the vessel cannot be seized under *B.*'s execution. Where the Court of Admiralty have given a sentence, it shall be taken that they had jurisdiction, unless the contrary appear on the face of it.

under



1788.

LADBROKE  
against  
CRICKETT.

under a necessity, for the safety and preservation of the vessel, to put into *Cowes* to repair; and reciting, that the agent of *Atherley* and the others in that suit had expended in the repairs 824*l.* 8*s.* 5*d.* for the due payment whereof he, *George Pasmore*, agreed that the said vessel and the tackle, &c. should be and remain a security by way of bottomry. It was farther stated that he should immediately sail with the said vessel for *London*, and would pay the bottomry bill on the 8th of *May*, 1787; and he thereby bound his executors, &c. and also the said vessel in the penal sum of 1648*l.* 16*s.* 10*d.* for payment of the sum due; and further bound himself, his executors, &c. not to depart with the said vessel from *London* till the money should be paid. *Atherley* and the others instituted a suit in the Admiralty on this instrument; and on the 1st of *January*, 1787, a warrant issued upon such proceeding from the Admiralty Court, empowering the defendant, as marshal, to arrest the said vessel, and to cite all those who had any interest therein to answer to the said *Atherley* and the rest in a cause of bottomry, civil and maritime. On the 1st of *January*, 1787, the defendant arrested the said vessel in the river *Thames*, and cited all the parties, &c. and was in possession when the plaintiff's executions issued. The case then stated that on the 16th of *July*, 1787, the Admiralty decreed the ship to be delivered to *Atherley* and the rest; and on the 22d of *November*, 1787, a warrant issued to the defendant, as marshal, to sell the ship; (which warrant, it is to be observed, only stated that proceedings had been had in a certain cause of bottomry, civil and maritime, between the parties, in which the Court had awarded possession, &c. without stating the grounds of the suit) by virtue of which warrant the defendant sold the ship for 980*l.* which was regularly certified to the Admiralty Court.

*Richardson*, for the plaintiff, contended, first, that the instrument given to *Atherley* by the owner and master of the ship was not a bottomry bond; and, secondly, even if it were, that the Court of Admiralty had no Jurisdiction over the subject matter. As to the first, all the writers on this subject have agreed that it is of the essence of a contract of bottomry, that the lender of the money should run the risk of the voyage, and that both the principal and the interest should be at stake upon it; and it is on that ground that these contracts are not



considered to be within the statute of usury (a). In all bottomry contracts a clause is added, that, in case the ship shall not perform the voyage, the money shall never be recovered. The form of pleading shews that this clause is essential to a bottomry bond, as it is always set forth in a declaration founded on it. And though the forms of writs and of legal proceedings in the courts of law do not constitute the law, yet they are good evidence of what the law is. Now in this instrument such a clause is wanting; neither does it contain any other words amounting to a covenant to discharge the borrower in the event of the ship's not performing the voyage, unless the following can be so considered, "that the vessel, and the tackle, &c, should be and remain a security by way of bottomry." But he insisted that these words could not give the instrument the effect of a bottomry bond, the essential part being wanting. For if A. draw an instrument, purporting to be a bill of exchange, which in law is not so, as if he say, "pay so much out of my growing subsistence," that will not make it a bill of exchange. 2 *Ld. Raymond*, 1361. 1 *Str.* 591. This appears from the general tenor of the instrument, not only negatively, not to be a bottomry bond, but there is also a subsequent clause, expressly subjecting the person of the borrower and his executors for the payment of this money at all events. And in the event of the loss of the ship, the obligor would still have been liable to an action on the bond, and could not have pleaded the instrument in discharge of it. Neither would a court of equity have interfered against the express stipulation of the parties. So that the principal was not hazarded in the event of the voyage. Secondly, the Court of Admiralty had no jurisdiction over the subject matter of this instrument, it having been made within the body of a county, and under seal. By the statutes 13 *Ric.* 2. c. 5. and 15 *Ric.* 2. c. 3. all contracts arising within the bodies of counties shall be tried in the courts of law, and not in the Admiralty. In 4 *Inst.* 135, it is said that if a charter party be made within any county, although it be to be performed either upon the high seas, or beyond the seas, yet it must be tried by the ordinary course of the common law, and not in the Admiralty. 2 *Will.* 265. is to the same effect. And if the Court of Admiralty will nevertheless proceed in such

1788.

LADBROKE  
against  
CRICKETT.

(a) 2 *Vez.* 143, 148, 151, 153.



1788.

LADBROKE  
against  
CRICKETT.

actions, a prohibition will be granted, 4 *Inst.* 135. 2 *Brown* 37. *Owen* 122. 2 *Ld. Raym.* 805. *Salk.* 34. Or the party injured by their proceeding, when they have no jurisdiction, may maintain an action for double damages under the statute *Hen.* 4. against the judge of the court, 1 *Roll. Rep.* 80. *Godb.* 261. or he is subject to the penalties of a *præmunire*. Here too, it is material to consider that the borrower was in the double capacity of owner and master of the ship. There was no necessity therefore to hypothecate the ship at all; and it has been held that where the repairs have been ordered by the owner, who was upon the spot, the ship itself is not liable, and the lender rests on the personal security of the borrower. 2 *P. Wms.* 367. The principle on which the body of a ship is liable for repairs arises from the necessity, where the repairs are done in a foreign country: But no such necessity existed in the present case, the repairs being done to an English ship, in an English port, and the owner himself on the spot. In *Johnson v. Shippen* (a), Lord *Holt* said, "If a ship be hypothecated here in *England* before the voyage begins, that is not a matter within the jurisdiction of the Court of Admiralty, for it is a contract made here, and the owners can give security to perform the contract." The form of pleading shews that the Court of Admiralty had no jurisdiction over this subject. For the obligee must have alleged in his libel that the contract was made within the Admiralty jurisdiction. *Hob.* 213. 2 *Ld. Raym.* 1453. But he could not have alleged it to have been made *super altum mare*, when it appears on the face of it to have been executed at *Cowes* in the *Isle of Wight*. It is also a decisive objection against the Admiralty jurisdiction in this case, that the contract was under seal. *Hob.* 79. 212. Upon the whole therefore it appears that the Court of Admiralty had no jurisdiction in this case, and their proceedings were *coram non judice*. And even if that court has in point of fact entertained questions of this sort, such usage cannot give validity to their proceedings. *Vaugh.* 170. *Hard.* 474.

*Wood* for the defendant, after observing that this was the case of a mortgage of the ship by the owner, which was followed by the mortgagee's taking possession of her afterwards, and that his right could not be divested by a subsequent execution;—was stopped by the Court.

(a) 2 *Ld. Raym.* 983. S. C. in 6 *Mod.* 79. and 11 *Mod.* 30.



LORD KENYON, Ch. J.—Considering this question in the manner in which it has been treated by the defendant's counsel, there can be no doubt. The plaintiff must make out the strength of his title by his own case: but it appears by this case that his execution was not executed till a legal conveyance had been made of the ship in question. It was clearly the intention of the parties that this property should be specifically subjected to the demand of the person advancing the money, under whose authority the defendant took possession of the ship. If no possession had been taken under this instrument, it would have been fraudulent; and any other creditor might have taken her in execution: but here the title of the first purchaser was consummated by taking possession of the ship. Therefore, without going into the other question, which has been made at the bar, it is sufficient to say that the plaintiff in this case has failed by the imbecillity of his own title; and if he is not entitled to recover, it is immaterial to consider in this case whether the Court of Admiralty had any jurisdiction or not. If the proceedings in the Court of Admiralty be erroneous, they are to be rectified on appeal: but if they have no jurisdiction over the subject matter, the whole is *coram non judice*; however, it is not necessary to examine that question here.

ASHHURST, J.—The justice of this case is clearly with the defendant. It does not appear to this Court for what the party libelled in the Court of Admiralty; we only look to the sentence; it does not appear from thence that they proceeded without having any jurisdiction, and we cannot presume that they acted improperly. Then the party having instituted a suit in that court and being in possession of the ship prior to the plaintiff's execution, there is no ground on which this action can be maintained.

BULLER, J.—I am of opinion that the plaintiff cannot recover in this case for the reasons given by my Lord. And I am as clearly of opinion that we cannot enter into the other question which has been made at the bar. This action is brought by the plaintiff, acting under the process of this court, against the defendant, who has also acted under the process of that court: and the law equally protects an officer acting under the Court of Admiralty, as it does one acting under the common law courts. If on the face of the proceedings the Court of Admiralty had jurisdiction, the officer was bound to execute the process, and could

1788.

LADBROKE  
against  
CRICKETT.



1788.

LADBROKE  
against  
CRICKETT.

could not examine into the foundation of them; and that will protect him. There is a great difference between applications to this court for prohibitions to the Admiralty, pending the suit, and after sentence; in the first case, this court will examine the whole case, and see the ground of the proceedings in the Admiralty: but the rule is quite the reverse, after a sentence is passed; in such a case they will not look out of the proceedings, for the party who applies for a prohibition, after sentence, must shew a nullity of jurisdiction on the face of the proceedings; therefore the plaintiff in this case could not go into evidence at the trial to impeach the decree of the Court of Admiralty. The case states in general terms that that court did pronounce a decree for the sale of the ship in question, and that a warrant issued out of that court for seizing and selling the ship. So that we must take it that they had jurisdiction, for nothing appears on the face of the decree to shew that they had not.

GROSE, J.—I thought at the trial, and am still of the same opinion, that trover would not lie against an officer of the Court of Admiralty acting under a decree of that court, it appearing on the face of it to be legal.

Postea to the defendant.

Tuesday,  
Nov. 11th.

WATSON against SHAW, and Others.

An affidavit to hold the defendant to bail, stating an act to have passed in the 27 G. 3. which was passed in the 22 G. 3. under which a penalty was incurred, is a fatal objection in an affidavit to hold the defendant to bail for such a penalty, even tho' the title of the act was properly set forth. It is sufficient if the affidavit shew the nature of the offence against the lottery act, without stating the particular circumstances of it.

THE defendant had been held to bail on an affidavit made by one *Margason*, stating that the defendants after the making of an act of parliament in the 27th year of the reign of his present majesty, entitled "An act for licensing lottery office keepers, and regulating the sale of lottery tickets" and during the drawing of a lottery so established, to wit, on the 14th day of *March* 1788, and on divers other days, &c. did take and receive of this deponent divers sums of money, and in consideration thereof did promise and agree to pay to this deponent divers sums of money, on certain events and contingencies relating and applicable to the drawing of certain tickets, or numbers in the said lottery; and that the defendants have thereby incurred divers pecuniary penalties to the amount of 500 l. And it further stated that the plaintiff intended to bring an action on behalf of our sovereign lord the king, and himself the said *George Watson*, for the recovery of such penalties, &c.

the nature of the offence against the lottery act, without stating the particular circumstances of it.

*Baldwin*



*Baldwin* had obtained a rule on a former day to shew cause why the defendants should not be discharged out of custody, and why the bail bond should not be delivered up, on two grounds; First, because the act of parliament was mis-recited in the affidavit, the offences imputed to the defendants being against an act of the 22d of the present king, and not the 27th; For though it was not necessary to state the act of parliament at all, yet being stated and mis-recited, it was fatal; and Secondly, because the affidavit did not specify the particular offence; it only stated that the defendants had taken and received *divers sums* of money, promising to pay *divers other sums* on certain events, without specifying either.

*Wigley* now shewed cause, and in answer to the first objection insisted that it was immaterial in what reign the act of parliament was stated to have been passed; for it appeared on the affidavit that the defendants had incurred certain penalties against an act of parliament, the title of which was set out correctly. He admitted that where the Sessions was mis-recited, it was fatal; *Dyer* 203. *R. v. Hill, Cro. Car.* 232. *Sav.* 41. *Langley v. Haynes, Mo.* 302. But in those cases the act was described as having been made "at a Sessions begun and holden "at such a day, &c." without setting forth the title of the act. If indeed the title of this act had been mis-recited, it would have been fatal, *Mills v. Wilkins, Salk.* 609. But here the title is properly set forth; and as it is a public statute, the Court may take notice of it, and reject the year as surplusage. With respect to the second objection; the case of *Davis v. Mazzingbie (a)* shews that though it was necessary to state the nature of the offence, the party was not bound to specify the particular act which constituted the offence: and here the nature of the offence is stated in the affidavit, namely, Insuring.

*The Court* were clearly of opinion that the first objection was fatal. The party was not bound to set forth the year in which the act passed, but having undertaken to do so and mis-recited it, it cannot be rejected as surplusage: he has here referred to another act of parliament which has no relation to this matter. But they held that the second objection was ill-founded; for the party had stated the nature of the offence, which was all that was necessary.

Rule absolute.

(a) *Ante*, 1 vol. 705.

1788.

WATSON  
against  
SHAW and  
Others.



1788.

Tuesday Nov.  
11th.

The word  
"estates" in  
a will will  
carry the fee,  
unless coup-  
led with  
other words,  
which shew a  
different in-  
tention.

See 3. Term  
Rep. 356. 4. Term  
Rep. 59. 11th.  
Blackst. 3.

## FLETCHER against SMITON.

CASE for money had and received. At the trial after last Easter Term, at Guildhall, before Buller J. a verdict was found for the plaintiff, with 14 l. damages, subject to the opinion of this Court, on the following case. *Matthew Woodward*, being seised in fee of four undivided eightieth parts or shares of buildings and premises, called the *Corn-market*, in the city of *London*, and of divers other freehold and personal estates, made his will on the 29th of *March*, 1766, duly executed, &c.; which, after directing all his debts to be paid, contained the following clauses: "Then I give to *Mary Woodward*, my wife, all my household goods, plate, linen, and jewels, at my houses at *Romford*, and *London*, with 500 l. to her own disposal, as she shall think fit. I give one annuity to be paid to *Mary Woodward* my wife, of 100 l. a year, by *William Morley* out of the profits of the corn trade, as by our articles specified, and 1000 l. to be left in the trade during her life, for this use and purpose; And also I give the said *Mary Woodward* the profit of my four shares in the *Corn-market* during her life; also, the income and profits of my estates, as follows, during her life; my lands lying [here followed a particular enumeration of his several estates,] as also the residue of my personal estate, to be laid out in Bank annuities; and *Mary Woodward* my wife to have the income during her life only of this and the estates before mentioned; and after her decease, as follows, I give to *Matthew Weatherley*, my nephew, the income of my four shares in the *Corn-market*, for his natural life; and all the rest of my estates, with all monies in stocks, and in *William Morley's* hands, or any other securities, to be divided in equal shares to *Elizabeth Snow*, *Elizabeth Mailard*, *Judith Weatherley*, *Joseph Weatherley*, and *William Weatherley*, share and share alike; and out of my wife's income she to pay to *Ann Audain* 30 l. yearly during her life." And he appointed his wife executrix. The testator afterwards died, without issue, leaving his widow *Mary Woodward*, and *Matthew Weatherly*, and *Ann Audain* (the sister of the testator) his coheirs alive at the time of his death. The widow afterwards died; on which *Matthew Weatherly* became seised of and enjoyed the said four shares during his life, till the 5th day of *October*, 1787, when he died, having devised

his



his real and personal estates to the plaintiff. The defendant is treasurer and paymaster to the proprietors of the *Corn-market*. He has received half a year's dividend on the four shares, and has the same still in his hands. This action was brought by the consent of all parties to try whether the reversionary interest in the four shares passed under the devise to *Elizabeth Snow* and the four other devisees. The question for the opinion of the court is, whether the reversionary interest in the said four shares passed under the devise to *Elizabeth Snow*, *Elizabeth Mailard*, *Judith Weatherly*, *Joseph Weatherly*, and *William Weatherly*? If it did not pass, the verdict to stand; otherwise for the defendant.

*Shepherd* for the plaintiff. It is apparent on reading this will that the devisor used the word "estates" as applying specifically to the things therein particularly enumerated, and which immediately follow the word "estates" in the first clause. In that place he clearly could not intend that a fee should pass by it, for those estates are given to his wife *for life*, and the word is there used as a particular description of the lands which she was to have for her life: then if he did not use it in a technical sense in one part of the will, it cannot be contended that he so used it in another part. The word then in the latter clause not being used technically, First, it does not apply to the shares in the *Corn-market*; but, Secondly, if it does, it cannot apply to his interest in them. As to the First, the word "estates" could not have been meant to apply to the *Corn-market*; for in the preceding clause the devisor gave to his nephew the income of his four shares in the *Corn-market* during his life, adding immediately afterwards "all the rest of my estates to *Elizabeth Snow* and the four other devisees, share and share alike;" so that in this latter devise the *Corn-market* is expressly excluded, and the word "estates" in the last clause must have the same signification with the same word in the first clause, where it cannot by possibility extend to the *Corn-market*. If it be contended that the devisor could only intend that his nephew should take an estate for life only in the *Corn-market*, and that the reversion should pass by the subsequent clause to the other devisees, otherwise it was nugatory to mention his nephew at all, as he would have been entitled to a still greater interest as heir; the answer is, that it was necessary that the devisor should give him the whole profits during his life, because he was only co-heir with another, and as such would

1788.

FLETCHER  
against  
SMITON.



1788.

FLETCHER  
against  
SMILTON.

would only have been entitled to a moiety, which is consistent with the intention contended for, namely, that the reversion should descend upon him in his character of heir. And as the deviser has not expressed any intention of parting with the reversion, the Court will not give it away from the heir by implication (a). Secondly, Though the word "estate" will, generally speaking, carry not only the thing described, but also the interest which the testator had in it at the time of making his will, yet the word "estates" has not the same legal operation. In the only cases in which the word "estates" has been held to pass a fee, it has been coupled with other words, such as "all my effects," &c. which shewed the deviser's intention of disposing of all his property: but in this case no such words are used, and it is apparent that the deviser did not mean to pass the reversionary interest in his shares in the *Corn-market*. In *Wilkinson v. Maryland* (b), where the deviser, being seised of lands in A. and B. which he devised to several persons, and of lands in C. by way of mortgage and forfeited, devised all his goods, *estates*, and mortgages, to his wife, it was held that the lands in C. did not pass; though the Court said, if he had devised all his *estate* in such land, or had mentioned that he had such land mortgaged in fee, and devised his mortgage, the fee had passed. And in *Goodwyn v. Goodwyn* (c), Lord Chancellor *Hardwicke* doubted whether a fee could be passed by the words "all my estates," which he said in common parlance means a description of the lands. Indeed, all the cases on this subject shew that if those words, which when technically used will carry the fee, are not so used, there must be something in the will to shew that they were intended to pass the fee. But the reverse of that intention is to be collected from this will.

*Wood, contra*, was stopped by the Court.

Lord KENYON, Ch. J.—The question is, whether the last clause in the will comprehends the reversion of the shares in the *Corn-market*, and carries the absolute inheritance in them to the devisees therein mentioned as tenants in common. There are cases in which nice distinctions have been taken between a

(a) Although the plaintiff claimed under one of the co-heirs alone, it was understood that no objection should be made on that ground against the plaintiff's recovering, this action having been brought by the con-

sent of all parties to try the question arising on the will.

(b) *Cro. Car.* 447.

(c) 1 *Vez.* 229.

devise



devise of an estate *at* such a place, and a devise of an estate *in* a particular place; and Lord *Hardwicke* alluded to it in the case cited in *Vezey* (a); but he added, that there is no case in which it was held, that a fee passed by the devise of an estate, if the testator added to it, "in the occupation of any particular tenant." And I admit that the word "estate" may be so coupled with other words as to explain the general sense in which it would otherwise be taken, and to confine it to mean *farms* and *tenements*. But that is not the present case; no such words are here superadded to "estates." It is admitted that if the word "estate" had been used, there could have been no doubt but that the reversionary interest in the shares in the *Corn-market* would have passed; and I think that must have been the testator's intention. For his first object was, that all his debts should be paid; now that intention might be defeated, unless the will were to operate on the whole inheritance, for the debts could not perhaps be paid out of the particular estate carved out of it. However, this case does not depend on general observation. For the word "estates" has been held equivalent to "estate," unless other words are added to express a different intention. In the case of *Tilley v. Simpson* (b), in the Court of

(a) 1 *Vez.* 228.

(b) *Tilley v. Simpson*. In Chancery, Easter, 1746.

The testator, after declaring that he intended to dispose of *all his wordly estate*, and making several devises to different persons, gave and bequeathed *all the rest and residue of his money, goods, chattels, and estate whatsoever* to his nephew *A. B.* The question was, whether a beneficial interest in a real estate not before disposed of would pass to the nephew by this devise.

Lord *Hardwicke*, Chancellor, was of opinion that it would. He said, where the court had restrained the word *estate* to carry personal estate only hath been where it hath appeared that it was the intention of the testator it should be so understood; as where it hath stood coupled with particular descriptions of part of the personal estate, as a bequest of all my mortgages, household goods and *estate*, in which the preceding words are not a full description of the personal estate: he did not know any of those cases where the preceding words were sufficient to pass the whole personal estate.

If the testator had said, "*all the rest and residue of my personal estate and estates whatsoever*," a real estate would have passed. This bequest amounts to the same, for the word *chattels* is as full a description of the personal estate as the word *personal*. Therefore when he hath used words comprehending all his personal estate, and then makes use of the word *estate*, that word will carry a real estate. The word *whatsoever* is used here, which is the same as if he had said, of whatever kind it be; and if that had been the case, it would most certainly have carried the real estate. The case of *Tirrel v. Page*, 1 *Ch. Cas.* 262. is very material to the present question, and I think cannot be distinguished; there the gift was of "*all the rest and residue of my money, goods, and chattels, and other estates whatsoever I give to J. L.*" The only difference in the case is that there is the word *other*, which I do not think can distinguish it. If it had been all the rest and residue of my household goods and mortgages, and all other estate, I do not think that would have carried the real. *See Doe on demise of Palmer v. Richardson* 3. *Term Rep.* B. R. 856. Chancery



1788.

FLETCHER  
against  
SMITON.

Chancery, E. 1746, the question was, whether by the words there used the fee should pass? Lord *Hardwicke* said, it would be productive of bad consequences to confine the devise to a chattel interest, unless there were other words to shew that it was intended to be so restrained: and he put this case, "If a testator devise all his personal estate and *estates* whatsoever; the inheritance shall pass by the latter words." That is strong to shew that the word "*estates*" would of itself carry a fee. Therefore on the authority of this case and many others, such as *Chester v. Chester* (a), I am of opinion that this devise conveyed the absolute inheritance in the shares in the *Cornmarket*, and that the testator did not intend that any thing should remain undisposed of by the general residuary clause.

ASHHURST, J. of the same opinion.

BULLER, J. This is a question merely on the intention of the testator, and I think it is apparent on reading the whole will, that it was his intention that every thing which he had should pass by it. For, after making particular bequests of part of his personalty, he directed that the residue of his personal estate should be laid out in the funds; then, after giving his real estate for lives, he devised all the *rest of his estates*, with all monies in the funds to the five devisees. Then as it appears that he had first disposed of all his *personal estate* by other words, he must have intended to pass his *real estate* by the subsequent words, for there was no other property on which they could attach.

GROSE, J.—Where the deviser intended to confine the operation of the word "*estates*," he added "*for life*:" but in the latter clause there are no words of restraint added.

*Postea* to the defendant.

(a) 3 P. Wms. 56. *But there the question was not from the want of intendment of inheritance, for a fee was expressly devised.*

Wednesday,  
Nov. 12th.

The KING against the Undertakers of the AIRE and CALDER Navigation.

Where a navigation runs from A. to B. through several inter-

vening parishes, and the tolls for the whole navigation are collected in those two parishes, they may be assessed to the poor rates in those two parishes for the whole amount according to the proportion collected in each. The justices at the sessions are the proper judges of the equality of poor rates; and the court of B. R. will not interfere upon the ground of their being unequal, unless the inequality be manifestly apparent on the rate.

tolls

*See King v. Page & Term Rep. B.R. 543.*



tolls and duties of the said navigation at *Leeds*, at and after the rate of 1000 *l. per annum*; and for their lands, wharfs, houses, warehouses, and other buildings in their own occupation, at and after the rate of 27 *l. per annum*: and against the former part of the assessment the defendants appealed to the Sessions, who affirmed the rate, stating the following case for the opinion of this Court.

“ That the said rivers *Aire* and *Calder* were made navigable by an act of parliament of the 10th and 11th of *Will. 3.* which act hath been amended by a subsequent act in the 14th *Geo. 3. c. 96.* under both which acts the undertakers are entitled to receive certain tolls and duties therein mentioned for all goods, &c. carried upon the said rivers or cuts therein mentioned; according to the distance which such goods shall be carried. The whole length of the navigation from *Leeds* to *Wheeland* measures 29 miles, of which 2790 yards in length and no more lie within the local limits of the township of *Leeds*. The whole tolls and duties arising upon the whole length of the navigation from *Leeds* to *Wheeland*, or *Selby*, from the 1st *January* 1785, to the 1st *January* 1786, amounted to 8234 *l. 6 s. 2 d.* exclusive of the tolls and duties arising from the said navigation from *Wakefield* to *Wheeland* and *Selby*, and the average amount thereof for three years before the 1st *January* 1786 was 7628 *l. 7 s.* The proportion of the tolls arising from the 2790 yards, part of the length of the said navigation, and lying within the local limits of the township of *Leeds*, amounted to 403 *l. 1 s. 10 d. per ann.*: and though upon the face of the assessment the undertakers stand only assessed at and after the rate of 1000 *l. per ann.*, yet as the houses and buildings within the township of *Leeds* are by the said assessment rated only at one moiety of the actual rents or real value, the undertakers stand actually assessed at and after the rate of 2000 *l. per ann.* The said undertakers of the said navigation had in a year commencing in *July* 1785, and ending *July* 1786, divided the sum of 17000 *l.* profits; but that sum was made of many articles besides the tolls and duties. The tolls and duties have been regularly and uniformly rated at the towns of *Leeds* and *Wakefield* from the year 1713, and at *Wakefield* from the year 1759, at the annual value of 1200 *l. per ann.*; the length of the navigation within the local limits of *Wakefield* being 1189 yards,

1788.

The KING  
against  
The Undertakers of the  
*AIRE* and  
*CALDER* Navigation.

*These words I understand ought to have been omitted because they misled the court into the supposition, that proportion of length of navigation was meant; whereas the fact meant to be conveyed was the amount of tolls actually received within the township of Leeds.*



1788.

The KING  
against  
The Undertakers of the  
AIRE and  
CALDER Na-  
vigation.

and the tolls and duties arising upon that branch of the navigation from *Wakefield* to *Selby*, or *Wheeland*, being more than that which arises upon the navigation from *Leeds* to *Selby*, or *Wheeland*. The mills, warehouses, and other real property of, the said undertakers have been rated from time to time in the townships or places where such property lies. But the tolls and duties have not been rated in any of the townships through which the navigation runs between *Leeds* and *Wheeland* or *Selby*, or between *Wakefield* and *Wheeland*, or *Selby*, except at the towns of *Leeds* and *Wakefield*. From the year 1752 the said undertakers have been invariably assessed for the tolls and duties, to the maintenance of the poor in the town of *Leeds* at the value of 600 *l. per ann.*; and they, or their lessees, have paid the assessments according to that value. The tolls and duties arising upon the whole length of the navigation have never in any one year during that space of time amounted to the annual sum of 8234 *l. 6 s. 2 d.* but in seven years during that time they have been considerably under that annual sum. In the year 1740, upon an appeal to this Court, it was ordered that the undertakers should stand assessed at the value of 500 *l. per ann.* In every land tax act from the year 1709 is contained a clause that the undertakers shall not be assessed to the land tax in any other part, township, or place, through which the said navigation runs, but at the towns of *Leeds* and *Wakefield*; and the undertakers have been uniformly assessed at *Leeds* at the same annual sums for which they have been rated to the poor rates, and in the above-mentioned act of parliament of the 14th of his present Majesty is contained a clause, which enacts "that the rivers or any of the cuts under the authority of that act shall not be subject or liable to the payment of any taxes, rates, or assessments, save and except such taxes, rates, and assessments, as had been and then were usually charged and assessed thereon."

*Law* and *Cockell*, Serjt. were to have argued in support of the order of Sessions, but the Court desired to hear the other side.

*Bearcroft*, *Erskine*, and *Fearnley*, *contra*, admitted that since the case in 3 *Keble*, 540. recognised in *Jones v. Maunsell* (a),

(a) *Dougl.* 292.



and other cases (a) it was not to be disputed but that the species of property in question was rateable : but they contended that it appeared upon the face of the rate that the company had been rated for more than the fair proportion of the profits of the navigation arising within the township of *Leeds*. This is stated to be a rate upon the tolls and duties arising from this navigation, and that so much has been assessed in respect of them within the township of *Leeds* : but it appears that the navigation runs for 29 miles, only 2790 yards of which lie within that township ; therefore this rate is evidently disproportionate to the extent of the navigation for which the township of *Leeds* is rateable. No principle can be better established than that every poor rate is to be assessed on the person *in respect of the property within the parish* ; therefore the company were not liable to be rated for more than the proportion of the tolls which accrued and became due in *Leeds*. The locality of the property is of the very essence of the rate. But if this rate can be supported, the township of *Leeds* will receive contribution from profits which accrue in other districts, for which the company will still be liable in those several places. For each of those intervening townships through which the navigation runs will have a right to rate the tolls in proportion to the extent of the navigation in each ; and it is no answer to the present rate to say that in point of fact they are not rated now in these districts, if by law they are liable to be so. And the case of *Putney bridge*, mentioned in the note in *Dougl.* 292. shews as far as it goes that great attention is paid to the locality of the subject of the rate. In the case of the *King v. Cardington* (b), where the grantee of the *Ouze* navigation was held rateable to the poor in *Cardington* for tolls arising from a sluice erected there, though he himself resided elsewhere, and the tolls were collected in another parish ; it is to be observed that the toll was in respect of the sluice which was locally situated in the parish of *Cardington* : and it goes to shew that in rating tolls arising from any navigation regard should be had to the extent of the navigation within the parish. In the *King v. Rebowe* (c), great stress was laid on the circumstance of the tolls not locally arising within the parish as a ground for their not being rateable there.

1788.

The KING  
against  
The Undertakers of the  
AIRE and  
CALDER Na-  
vigation.

(a) See *Rowlls v. Gell*. *Cowp.* 453. 1 vol.  
723. n. a. R. v. *St. Nicholas Gloucester*.

(b) *Cowp.* 581.

(c) *M.* 12 G. 3. *Bott.* 384. *4 Lloyd* 77.



1788.

The KING  
against  
The Undertakers of the  
AIRE and  
CALDER Na-  
vigation.

There is besides another objection to this rate arising out of the 14 *Geo. 3. c. 96.* an act relating to this navigation; which provides that the company shall not be liable to any rates or assessments which had not been *usually* charged or assessed; now though the defendants cannot insist upon the custom stated of their never having been rated at more than 600 *l.* because the whole matter arises upon an act within memory, yet the fair construction of that provision is that they shall not be assessed now for more than they had been before that time. For it must be supposed that the legislature intended some benefit to the company; but if this construction be not put upon it, that provision will be nugatory. Now it appears that they only stood rated then at 600 *l.* within the township of *Leeds*, which ought therefore to have been the proportion for which they should have been rated in this instance. Another objection was made, that it did not appear that the rate had been published in the church, pursuant to 17 *Geo. 2. c. 3. s. 1.* It was only stated to have been made and allowed, which did not include publication.

LORD KENYON, Ch. J.—With respect to an objection which has been taken by Mr. *Fearnley*, that it does not appear by this case that the rate in question was regularly published in the church: if the question were whether an action of trespass could be supported by the persons whose goods were distrained for non-payment of the rate, there is no doubt but that the publication of the rate under the statute of the 17 *Geo. 2. c. 3.* must be proved: but the parties here come upon facts ascertained by the court of sessions, on which they ask for the opinion of this court as to the question of law arising upon those facts; therefore it would be wandering from the point to seek objections which were never intended to be referred. Then it was said at the bar, that a custom commencing in the year 1709 cannot control the express provisions of an act of parliament: that is true; but contemporary usage in such a case would give some assistance in the construction of an act of parliament. The observation which was made at the bar on the statute 14 *Geo. 2. c. 96.*, namely, that it prohibited any increase in the rate which existed at that time, does not appear to be well founded. On the fair construction of that act of parliament, it might perhaps be decided that no other kind of rate than those which were assessed at that time should be imposed; as for instance if an  
highway



highway rate, or church rate, or county rate, had not been collected before, the legislature meant that no such new rate should be imposed for the future: but the *quantum* of the rates, which had been imposed, must necessarily vary according to the exigencies of the case. For supposing at that time the land tax had been at 2 s. in the pound, it would be doing great violence to the words of the act of parliament to say that it never should be raised in any future exigency. The remaining question, and indeed the great one in this case, is, whether the rate in question on this property has been assessed in a larger proportion than it ought. It is admitted generally that this species of property is rateable; it is also admitted that the justices at the sessions are the proper judges respecting the equality or inequality of the rate. In the case of *the King v. Brograve* (a), the Court said they could not enter into the inequality of the rate, unless it manifestly appeared to be unequal: and this rule appears to have been laid down with great wisdom by the judges who sat in this court at that time. It has been argued that, as the whole extent of this navigation is many miles, of which that which lies in *Leeds* forms but a small part, the rate in question exceeds its due proportion: but that is not the rule by which these proportions are to be ascertained. It is well known that the Duke of *Bridgwater's* navigation at *Manchester* extends thirty or forty miles, within three miles of the end of which the grand trunk empties itself, and of course the tonnage in that part of the navigation exceeds beyond all comparison the proportion in any other part of it. So that it is most probable that the part of this navigation which comes into the town of *Leeds* is of greater value than any other part. However I disclaim forming my opinion upon any conjecture of this sort, though it is probably well founded; it being enough for me to say, what was said by this Court in the case reported in *Burrow*, that we cannot enter into the inequality of the rate, unless it be manifestly unequal upon the face of it. Therefore, without entering into any discussion of more points which are open to it, I am clearly of opinion that this rule ought to be discharged.

ASHHURST, J.—The greatest part of the argument used by the counsel, who have argued in support of this rule, is founded upon a supposition that every parish between the extremes of

1788.

The King  
against  
The Under-  
takers of the  
AIRE and  
CALDER Na-  
vigation.

(a) 4 Burr. 2491.

this



1788.

The KING  
against  
The Under-  
takers of the  
AIRE and  
CALDER Na-  
vigation.

this navigation receives an equal benefit. But that in all probability is contrary to the fact; for most likely many barges are navigated near the town of *Leeds* which do not pass any other part of the navigation. So that the proportion for which the profits of this canal have been rated in this parish does not necessarily exceed the *quantum*. The case then before us is extremely simple; for this Court never interferes in a question of inequality of a rate, unless it manifestly appears on the rate itself to be unequal: now that does not so appear in this case; and therefore I am of opinion that it must be confirmed.

BULLER, J.—If the objection, which was taken by one of the counsel, that the rate does not appear to have been published in the church, would hold, it would destroy every case of this sort which comes before the Court. But the distinction between orders of justices and special verdicts has been long established; in the latter, where it concludes generally, the whole case must appear upon record; but the very reverse is the rule which obtains in the case of orders of justices; for the Court will intend every thing to be right, which does not appear to be otherwise, and they will not entertain any doubt upon a subject upon which the justices did not. Here the court of Sessions have said that the rate was duly made; they made no question about the publication of the rate, and they did not intend to leave any question upon that head to the Court. Then it becomes necessary to consider those facts in this case upon which the law arises; and it is material to observe that it is not stated that the tolls are collected at any other place than *Leeds* and *Wakefield*; for if there were any other houses in different parishes at which the tolls are collected, it would make a difference; but on this state of the case we are bound to take it that all the tolls are collected at these two places. Taking that fact therefore as clear, I think the case which has been decided in this Court must govern the present. It is material to consider at what place the toll becomes due. I agree that, if a person has property in *Yorkshire*, and receives the profits of it in *London*, he shall not be rated for it in *London*; for a toll must be considered to be paid at the place where it becomes due. It is impossible to adopt the argument used at the bar that the toll becomes due at the end of every mile for that mile; for it is an entire contract to carry the goods the whole distance intended, and the hire is payable at the place to which by that contract they are to be carried.



carried. The case of *Putney-bridge* (a) is an illustration of the present; there the bridge is rated in *Putney* and *Fulham* parishes at 700*l.* a year in each, there being gates at each end; formerly there was no gate at the *Putney* end, and then the bridge was not assessed in *Putney* at all. With respect to the last objection on the act of the 14 *Geo. 2. c. 96.* if that argument has any weight, it must go the length of saying, that the legislature intended that a certain sum should be raised at all events, neither more nor less: but that would be doing great injustice; for it is stated that the tolls in *Leeds* amounted only to 400*l. per annum*, and yet at that moment they were rated at 600*l.* a year; and if the rates should be reduced, it would be manifest injustice to say that the proprietors of this navigation should be still rated at 600*l. per annum.*

GROSE, J. said that this case was abundantly too clear to require any farther comment.

Rule discharged.

(a) *Dougl.* 305. n. 2d. edit.

1788.

The KING  
against  
The Undertakers of the  
AIRE and  
CALDER Na-  
vigation.

RUSSELL and Others *against* The Men dwelling in the  
County of DEVON.

Friday,  
Nov. 14<sup>th</sup>.

THIS was an action upon the case against the *men dwelling in the county of Devon*, to recover satisfaction for an injury done to the waggon of the plaintiffs in consequence of a bridge being out of repair, which ought to have been repaired by the county; to which two of the inhabitants, for themselves and the rest of the men dwelling in that county, appeared, and demurred generally.

*Chambre*, in support of the demurrer, insisted that by the laws of this kingdom no civil action can be maintained against the inhabitants of a county at large for any injury sustained by an individual in consequence of a breach of their public duty. No instance can be found of any attempt to support such an action as the present, which is a strong argument to shew that such an action will not lie, especially where the circumstances, which would give occasion to it, are in daily occurrence: for on principle there can be no distinction between any special injury arising from a neglect in not repairing a bridge and an highway. But this

No action  
will lie by an  
individual  
against the  
inhabitants of  
a county, for  
an injury sus-  
tained in con-  
sequence of a  
county bridge  
being out of  
repair.



1788.

RUSSELL  
against  
The Men of  
DEVON.

does not rest on general observation only; for if the principles, on which this action must be supported, are examined, it will be found equally clear. Consider, first, who are the necessary parties to all civil suits; they must either be brought against individuals, who are to be particularly named, or against corporations, or against persons who are rendered liable by the provisions of particular acts of parliament: if it be brought against individuals, all of them must be brought before the Court; they must appear before the Court or be outlawed. This mode of bringing actions against large bodies of men would render nugatory the privilege of the Crown of creating corporations, and would destroy the mode of suing corporations in their corporate capacity. And no act of parliament has yet made the inhabitants of a county at large liable in this case. Besides here the defendants are the men of *Devon*, who must be taken to mean the inhabitants of that county at the time of purchasing the writ: but the inhabitants of a county are a fluctuating body, and before judgment obtained, other persons may have come to reside in the county, when the whole damages may be levied on such innocent persons; whereas, if the action could be maintained at all, the damages should be paid by those who were inhabitants at the time when the injury was sustained. And it is a principle of law, that no man shall be responsible for any injury unless occasioned by his own act or default. If it be contended that this mode of suing is founded on the analogy it bears to actions on the statutes of hue and cry, and actions on the 9 *Geo.* 1. c. 22. s. 7. to recover damages sustained by fire; the answer is that the legislature has given a remedy in those particular instances; and when an act of parliament renders any description of men liable to an action, the courts of law must devise some means by which they may be sued. But the statutes of hue and cry furnish an argument to shew that the present action cannot be maintained. The obligation to make hue and cry subsisted at common law: 2 *Inst.* 172. or at least by the statute of *Westminster* 1st. (a), which was prior to the statute of *Winton* (b), by which the inhabitants of a hundred were subjected to an action. But if the hundred had been liable to a civil action by the common law, or the statute of *Westminster*, which raised the duty, the statute of *Winton* would have been nugatory. But it was only on the ground of the hundred's not being liable before that

(a) 3 *Ed.* 1. c. 9.(b) 13 *Ed.* 1. s. 2. c. 6.



time that the legislature made them responsible in a civil action. The consequence of permitting these sort of actions to be maintained deserves the serious attention of the court, since it must necessarily lead to a multiplicity of actions; for as the whole damages to be recovered might be levied on any one individual, he must have recourse to numberless suits in order to reimburse himself for the excess which he must pay beyond his own proportion. The principle which decides against this kind of action is in *Bro. Abr.* title "*accion sur le case*" pl. 93. where it is said that if an highway be out of repair, by which my horse is mired, no action lies, "*car est populus et serra reforme per presentment*;" which must be understood to mean, that, as the road ought to be repaired by the public, no individual can maintain an action against them for any injury arising from their neglect.

*Gibbs contra.* The general principle is, that where one person receives an injury by any other person or persons omitting to do what by law he or they are bound to do, he may maintain an action on the case to recover satisfaction for the damage he has received in consequence of that omission. In the present case the county were bound to repair this bridge; they omitted to do so; and the plaintiffs received a particular injury by that omission. It is true that this neglect in the county was a public nuisance, and was an injury to *all* the king's subjects; and that no individual could have brought an action for his share of the *general* injury; but this is a *special damage* sustained by the plaintiffs, who have therefore a right to recover a satisfaction in damages. In *Iveson v. Moore* (a) it was held that an action on the case for stopping a public way, whereby persons were prevented from coming to the plaintiff's colliery, might be supported. So that there is no objection to this action from the nature of the injury. If any individual, or a corporation, ought to have repaired this bridge, there can be no doubt but that the action would have lain. Now there is no difference between an action against an individual, or a corporation, and the present which is brought against the men residing in the county of *Devon*, who have been guilty of the same neglect. With respect to the plaintiffs, the injury is the same; they are equally innocent, and have suffered by the default of others who were bound by law to perform a duty which they neglected: they therefore

1788.

RUSSELL  
against  
The Men of  
DEVON.

(a) 1 *Ld. Raym.* 486.

upon



1788.

RUSSELL  
against  
The Men of  
DEVON.

upon every principle of reason and justice ought to have reparation. With respect to the defendants, they are equally guilty of a breach of duty, and are at least equally able to make this compensation; they therefore on the same principles of reason and justice ought to make satisfaction to the plaintiffs who have suffered by their neglect. *Et ubi eadem est ratio idem est jus.* Upon principle, therefore, the plaintiffs are entitled to recover a satisfaction against the defendants; but the defendants wish to shelter themselves under the forms of law, and say that, though in justice they ought to make a compensation, there is no mode by which they can be compelled to do it. However there is no ground for such an objection, because they may be compelled to appear in a civil action by the same process by which they are brought into court in an indictment, namely, by *venire* and *distringas*. With respect to the statutes of hue and cry, from which part of the defendant's argument was drawn, it will appear on consideration that the cases which have been determined on those statutes furnish an argument in favour of this action. All actions against the hundred are brought on the 13 *Ed. 1. c. 2. 1 Ventr. 235. Yelv. 116.* and not on the statute 27 *Eliz. c. 13.* and therefore if a declaration were to conclude *contra formam statutorum* it would be bad. The statute 13 *Ed. 1. c. 2.* enacts that inquests shall be made in the hundred, &c. where felonies are committed, so that the offender may be attainted, and if the county will not answer for the bodies of such offenders, every county, that is, the people dwelling in the county, shall be answerable for the robberies done, and also the damages, so that the whole hundred, where the robbery shall be done, shall be answerable. And "by construction upon the statute *Winton. 13 Ed. 1.* If the country, does not apprehend the felons within forty days, an action lies against the inhabitants of the hundred, where the robbery was committed, for the money or goods whereof the party was robbed." 3 *Com. Dig. title Hundred, C. 2.* Now it is to be observed that the statute does not prescribe the form of action or the mode of proceeding against the hundred; it merely declares that they shall be answerable; but the common law interfered and supplied the form of action and the process by which they are to be brought into court. Then to argue by analogy; as in that case the common law furnished the form of action to recover against the hundred



that satisfaction which the legislature declared they should make: so in the present case will it afford a remedy, and compel the county to make that compensation which it says on principle they are bound to do. It has been said that great injustice might be done to those who were not inhabitants of the county at the time when this injury was sustained, by making them responsible for the neglect of their predecessors; but that objection would apply with equal force to the action on the statutes of hue and cry as to this. With respect to the argument drawn from the novelty of the action, it may be answered by recollecting that the persons who are bound to repair bridges and roads are generally compelled by indictment to repair them before any special damage has been sustained. As to the case in *Bro. Abr.*; perhaps it was not considered to be such a special injury for which an action would lie; the instance put is only that of miring a horse: but it does not follow that, if there had been any serious damage (a), the action would not have lain. However it is to be observed that, at the time when that case was determined, doubts were entertained concerning other actions upon the case, which are now clearly held to be maintainable; for it was doubted by *Baldwin Ch. J.* whether an action could be supported for a special damage arising from a nuisance in an highway; though *Fitzberbert J.* was indeed of a different opinion.

*Chambre*, in reply, was stopped by the Court.

Lord KENYON, Ch. J.—If this experiment had succeeded, it would have been productive of an infinity of actions. And though the fear of introducing so much litigation ought not to prevent the plaintiff's recovering, if by law he is entitled, yet it ought to have considerable weight in a case where it is admitted that there is no precedent of such an action having been before attempted. Many of the principles laid down by the plaintiff's counsel cannot be controverted; as that an action would lie by an individual for any injury which he has sustained against any other individual who is bound to repair. But the question here is, whether this body of men, who are sued in the present action, are a corporation, or *quasi* a cor-

(a) The case in 5 *Ed. 4.* 2. from which the passage in *Broke* is taken, supposes a damage to be sustained in consequence of mir-

ing the horse.

(b) *Bro. Abr.* title *Action sur le casé*.

1788.

RUSSELL  
against  
The Men of  
DEVON.



1788.

RUSSELL  
against  
The Men of  
DEVON.

poration, against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose. But it has been said that this action ought to be maintained by borrowing the rules of analogy from the statutes of hue and cry: but I think that those statutes prove the very reverse. The reason of the statute of *Winton* was this; as the hundred were bound to keep watch and ward, it was supposed that those irregularities which led to robbery must have happened by their neglect. But it was never imagined that the hundred could have been compelled to make satisfaction (a), till the statute gave that remedy; and most undoubtedly no such action could have been maintained against them before that time. Therefore when the case called for a remedy, the legislature interposed; but they only gave the remedy in that particular case; and did not give it in any other case in which the neglect of the hundred had produced any injury to individuals. And when they gave the action, they virtually gave the means of maintaining that action; they converted the hundred into a corporation for that purpose: but it does not follow that, in this case where the legislature have not given the remedy, this action can be maintained. And even if we could exercise a legislative discretion in this case, there would be great reason for not giving this remedy; for the argument, urged by the defendant's counsel, that all those who become inhabitants of the county after the injury sustained and before judgment, would be liable to contribute their proportion, is entitled to great weight. It is true indeed that the inconvenience does happen in the case of indictments; but that is only because it is sanctioned by common law, the main pillar of which, as Lord Coke says, is unbroken usage. Among the several qualities which belong to corporations, one is that they may sue and be sued; that puts it then in contradistinction to other persons. I do not say that the inhabitants of a county or hundred may not be incorporated to some purposes; as if the king were to grant lands to them, rendering rent, like the grant to the good men of the town of *Islington* (b). But where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in

(a) *Vide ante* 1 vol. 71. 2 *Wils.* 92, 3.(b) *Dyer* 100.



their individual capacity, but out of their corporate estate: But if the county is to be considered as a corporation, there is no corporate fund out of which satisfaction is to be made. Therefore I think that this experiment ought not to be encouraged; there is no law or reason for supporting the action; and there is a precedent against it in *Broke*: though even without that authority I should be of opinion that this action cannot be maintained.

ASHHURST J.—It is a strong presumption that that which never has been done cannot by law be done at all. And it is admitted that no such action as the present has ever been brought, though the occasion must have frequently happened. But it has been said that there is a principle of law on which this action may be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him a remedy. But there is another general principle of law which is more applicable to this case, that it is better that an individual should sustain an injury than that the public should suffer an inconvenience. Now if this action could be sustained, the public would suffer a great inconvenience; for if damages are recoverable against the county, at all events they must be levied on one or two individuals, who have no means whatever of reimbursing themselves: For if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy. However there is no foundation on which this action can be supported; and if it had been intended, the legislature would have interfered and given a remedy as they did in the case of hue and cry. Thus this case stands on principle: but I think the case cited from *Broke's* abridgement is a direct authority to shew that no such action can be maintained; and the reason of that case is a good one, namely, because the action must be brought against the public.

BULLER J. and GROSE J. assenting.

Judgment for the defendants.

1788.

RUSSELL  
against  
The Men of  
DEVON,



1788.

Friday,  
Nov. 14.SALOMONS *against* NISSEN and Another.

If the consignee of goods, to whom the bill of lading is indorsed in blank, assign it over as a security for acceptances given by the assignee not amounting to the value of the goods, and afterwards by an agreement between them, they become partners in the goods, by which agreement it appears that the consignor has not been paid for them, the assignee of the bill of lading cannot maintain trover against the consignor if he stop the goods *in transitu* upon the insolvency of the consignee.

**T**ROVER for 705 pigs of lead, tried at the fittings at Guildhall before Buller J.; verdict for the plaintiff 1000*l.* subject to the opinion of this Court on the following case:

*Edward Hague* bought the 705 pigs of lead of the defendants in *Liverpool* on the 1st of *March* 1787, and ordered them to be shipped to *Rouen* in *France*. The lead was of the value of 1000*l.* The said lead was accordingly shipped on the 10th of *March* 1787 by the defendants at *Chester* on board the *Jane*; and the bill of lading was indorsed by the defendants in blank, and sent to *Edward Hague*. The plaintiff on the 16th of *March* 1787 gave *Hague* his acceptances for 700*l.* as stated in the following note; upon which *Hague* delivered the bill of lading to the plaintiff. *London*, 16th of *March* 1787; "Whereas *Jonas Salomons* has this day accepted for us the sum of 700*l.* at two months on account of a cargo of lead sent to *Rouen*, we hereby promise, in case the said lead is not remitted for, by the time these bills fall due, they shall be renewed for two months longer. *Charles and Edward Hague*." The acceptances were paid by the plaintiff when due to the indorsees of these acceptances. On the 21st of *March* 1787 the following agreement was made between *Edward Hague* (who traded under the firm of *Charles and Edward Hague*) and the plaintiff; "Be it known that it is this day agreed between *Edward Hague* of, &c. trading under the firm of *Charles and Edward Hague*, of the one part, and *Jonas Salomons* of the other part as follows; that the said *Jonas Salomons* should pay for and send in his name to Messrs. *Robert Garvey* and Co. merchants, at *Rouen*, a cargo consisting of seven hundred and five pigs of lead to be shipped at *Chester* on board the *Jane*, bound to *Rouen*, to be sold by Messrs. *Robert Garvey* and Co. at the best price and prices that can be obtained for the same; and the net proceeds to be remitted to the said *Jonas Salomons*. And it is hereby agreed between the said parties that the profit and loss arising from the said cargo of lead shall be equally divided between the said *Edward Hague* and *Jonas Salomons*. And the said *Edward* doth hereby promise and agree to and with the said *Jonas Salomons*, that in case the said cargo of lead is sold



sold at *Rouen* by the said *Robert Garvey* and Company upon credit; that then and in such case the said *Robert Garvey* and Co. shall stand *del credere* for the purchasers, and that he the said *Edward Hague* shall and will stand guarantee to the said *Jonas Salomons* for the solidity of the said house of trade of *Robert Garvey* and Co. and the due payment by them of the proceeds of the said cargo of lead: And lastly it is agreed that the said cargo of lead shall be insured by the said *Edward Hague*, or by the said *Jonas Salomons*, to the amount of 1100 l.; and that the policy of insurance shall be and remain in the hands and possession of the said *Jonas Salomons*, for him to recover and receive such loss and losses as may arise upon the said cargo of lead, and should be recoverable from the underwriters of such policy; and that he the said *Jonas Salomons* shall and will account with the said *Edward Hague* for the monies so recovered upon the policy, in case of loss as aforesaid." The vessel sailed with the lead for *Rouen* in *March* 1787, but was forced back by stress of weather to *Chester*; and *Edward Hague* having become a bankrupt, and the defendants not having been paid the price of the said goods, the defendants on that account on or about the 5th of *April* stopped the said goods while they were on board the ship in *England*, and took them away. The goods were never paid for by *Hague* or any other person. On the 25th of *May* *Jonas Salomons* demanded the 705 pigs of lead of the defendants, who refused to deliver them, and converted them to their own use.

*Dauncey* for the plaintiff. The general question is only how far the assignment of a bill of lading by the original consignee to a third person is a transfer of the property against the original consignor. As to which the case of *Lickbarrow and Mason* (a) is in point; and is a direct authority to shew that an assignment of a bill of lading by the original consignee, for a valuable consideration, where the transaction is *bonâ fide*, is a complete transfer of the property, and divests the right of the consignor to stop the goods *in transitu* in any event. It may perhaps be argued on the part of the defendants that the agreement between the plaintiff and *Hague* amounts to a partnership between them, and therefore that the question will remain the same between the

1788.

SALOMONS  
against  
NISSEN.

(a) *Ante* 63.



1788.

SALOMONS  
against  
NISSEN.

plaintiff and the defendants, as between them and the original consignee. But, First, that agreement does not amount to a partnership; or, Secondly, if it does, it is not of such a nature as to enable the defendants under the circumstances to retain possession of the goods against the plaintiff. As to the First, there is no ground for contending that there was any general partnership between the plaintiff and *Hague*; and though indeed there may be a partnership subsisting for a particular purpose, according to *Willet v. Chambers* (a), yet that will not apply to the present case. In *Hoare v. Dawes* (b) it was held that in order to make a man answerable as partner with another, there must either be a contract between him and the ostensible person to share jointly in the profits and loss; or he must have permitted the other to make use of his credit, and to hold him out to the world as one jointly answerable with himself. But there is no pretence for considering this as a dormant partnership; neither has credit been obtained by any false representation. If the agreement had stopped at the division of the profits, it could not have been contended that as for this purpose at least there was no partnership: but then it proceeds to state that *Hague* shall stand guarantee to the plaintiff for the solidity of the house of *Garvey* and Co.: this was no private or concealed covenant between the parties purposely omitted in the articles of partnership in order to gain a false credit, which would have rendered the plaintiff liable on account of the other ground, but it makes a part of the original agreement itself, and is equally notorious. This agreement is an entire contract, and must be construed all together; and then there is one case where the parties are not to share jointly, which is destructive of the principle of partnership. Secondly, if it be considered as a partnership; yet it was not of such a nature as will justify the detention of these goods by the defendants, upon the ground of being at liberty to stop them *in transitu* as against *Hague*. It is necessary to consider the situation of the parties, and the dates of the different transactions. The goods were bought of the defendants by *Hague* only on the 1st *March* 1787; the bill of lading was signed on the 10th; and on the 16th of the same month it was assigned to the plaintiff for a valuable consideration, whereby

(a) *Cowp.* 814.(b) *Dougl.* 356.



the right of the consignor was divested, and continued so from the 16th to the 21st, when the agreement was entered into. So that at all events there was a period of five days during which the defendants had no right to retake the goods. Thus far the case falls exactly within the principle of *Lickbarrow v. Mason*. Then the agreement which is stated will not vary it: that was only for a re-sale of the goods which it appears were once absolutely vested in the plaintiff; and must be considered as entirely distinct from the transfer of the property to him on the 16th. Taking that to be so, it must not only be contended that that agreement revives a right in the consignor, who is no party to it, which was once clearly divested, but that it also creates a right against the plaintiff which never before existed. But in order to give the defendants a right to retake the goods as against the plaintiff, they should have considered him as jointly interested in them, and that they were sold on the joint credit of him and *Hague*. But there is no pretence for saying that the partnership existed at the time when the goods were assigned to the plaintiff for a valuable consideration, much less when they were originally consigned to *Hague*. Besides, in case the goods had reached the plaintiff's hands, to say that the defendants would have had a right to recover the value of them would be to raise an assumpsit by an *ex post facto* private agreement between others than the original parties to the contract: for there is no colour for saying that the plaintiff was originally interested in the contract. Nor can the partnership agreement have relation to the original contract; as that would be to divest a legal right by relation, which is never permitted. 18 *Vin. Abr.* 285. The doctrine of relation only extends to the same thing and the same parties. But if it hold as for the defendants, it must equally be taken in favour of the plaintiff. Then as insolvency in the consignee is the only ground for stopping goods *in transitu*, the defendants had no right to detain them in this case, where the plaintiff is not stated to be insolvent. Here the loss must at any rate fall on one of two innocent individuals; and the language of the Court on such occasions has always been, that where one of two innocent persons must suffer by the act of a third party, the loss shall fall upon him who enabled that third person to impose upon the other. Now here the bill of lading was indorsed in blank to *Hague*, who therefore transferred



1788.

SALOMONS  
against  
NISSEN.

red the goods to the plaintiff for a valuable consideration by the authority of the consignors: they then must sustain the loss.

*Wood*, for the defendants, observed that this was very distinguishable from the case of *Lickbarrow* and *Mason*: that case only determined that the indorsee of a bill of lading, who had paid a valuable consideration for the indorsement, and had received it without notice, had a right to retain the goods as against the consignor. But that case so far governs this, that as between *Hague* and the defendants they would clearly, according to the principles there laid down, have been justified in stopping the goods *in transitu*: and the question here is, whether the plaintiff's right is in this respect different from that of *Hague's*. *Hague* on the 1st of *March* ordered the goods in question, and the bill of lading was sent on the 10th; on the 16th he borrowed the plaintiff's acceptances of 700 *l.* for two months: that sum was borrowed with reference to the cargo mentioned in the bill of lading, but it was not to be paid till the arrival of the cargo. This was therefore a loan to *Hague* to induce him to admit the plaintiff into partnership in this transaction: and by the subsequent part of the agreement it manifestly appears that the goods then remained unpaid for within the plaintiff's knowledge, for it says that the plaintiff "shall pay for them." By that agreement also he became partner with *Hague* for this particular purpose; consequently he is subject to the same equity as his partner the original consignee was; he has adopted his acts, and stands in his place. In the case of *Wright v. Campbell* (a), it was held that if a factor plays over a bill of lading with notice to a third person, then it may be followed into the hands of such third person by the consignor. The same principle was adopted in *Savignac v. Cuff*, which is cited in *Lickbarrow v. Mason*. There *Selvetti* assigned the goods to *Lingham* in *England*, and sent him bills of lading indorsed in blank, who indorsed them to *Savignac* for a valuable consideration, shewing him at the same time the letter of advice and the bill of parcels, by which it appeared that the goods had not been paid for: And it was held that the assignee of the bill of lading should be bound by such notice; and the original consignee having become insolvent, the right of the consignor to retake the goods *in transitu* was acknowledged. By a parity of

(a) 4 *Bur.* 2046. 2050.

reasoning



reasoning therefore, the plaintiff having had notice that these goods were not paid for shall be bound by such knowledge, and precluded from recovering the value against the defendants, they not having received a valuable consideration for them.

1788.

SALOMONS  
against  
NISSEN.

*Dauncey* in reply. It is not stated that the plaintiff took the assignment of the bill of lading with notice that the goods had not been paid for; and it has only been attempted to be inferred from the agreement. But it appears by the case that the acceptances were given on the 16th of *March*, when the bill of lading was indorsed over; and it was not till the 21st that he had notice by the agreement that they were not paid for. However that makes no difference. The assignee is not to look at any private transaction between the original parties; he trusts to the bill of lading, which in its nature is a negotiable instrument; and it was upon the faith of that that he actually paid a consideration. This money could not be said to be paid in order to become a partner, for the acceptances were given before the agreement, so that the goods might be said to have been already bought at that time. In *Wright v. Campbell* the goods had been sent to the *factor* of the consignor, who had not given him any right to assign them: but here the vendor gave the vendee an absolute disposition over the goods; and there too the indorsee had not actually advanced any money or other consideration, as was the case here. If the defendants have any claim, at most it only amounts to an equitable one; but the plaintiff has also an equitable lien on the goods for the amount of the 700 *l.* and the equity of the one may be set off against the equity of the other.

Lord KENYON, Ch. J.—This appears to be a harsh demand against these defendants, who it is confessed have not received the value of the goods in question. The first case on this subject is that of *Snee and Prescott* (a), before Lord *Hardwicke*, who was of opinion that where a merchant has sold goods, which have not in fact been delivered nor paid for, he may, while they are *in transitu*, obtain the possession of them again by any means short of absolute violence. But the case of *Lickbarrow and Mason* has in my mind very properly narrowed the extent of that doctrine: that case was decided on principles of policy and common honesty; it was there said that if the goods come into

(a) 1 Atk. 245.



1788.

SALOMONS  
against  
NISSEN.

the hands of a third person for a valuable consideration, *bona fide*, and without notice, he shall not be prejudiced, because the confignor was so incautious as to trust the goods out of his possession without payment. But this case is widely different from that of *Lickbarrow* and *Mason*, and is virtually the case of *Snee* and *Prescot*. It was ingeniously put by the plaintiff's counsel that there was an interval of five days, in which the plaintiff in this cause must be considered as the purchaser of these goods for a valuable consideration, without notice, under a title which was indefeazible: if the fact were so, to be sure the consequences which he stated would necessarily have followed. But during that interval the plaintiff was not in such a situation; he had not then paid for the goods; and then he stood in the situation of the holder of a bill of lading without having paid for the goods, when, according to the opinion of Lord *Hardwicke* in the case of *Snee* and *Prescot*, he had no right to them as against the original confignor. On this ground therefore I am of opinion that the case of *Lickbarrow* and *Mason* is not shaken by this determination: but on the very ground on which that case was decided, I think that the defendants in this case had a right to detain these goods.

ASHHURST, J.—Although in general the confignor of goods is entitled to stop them *in transitu* in case of the insolvency of the consignee if he has not been paid for them, yet that rule does not hold in the case of an assignment of the bill of lading to a third person for a valuable consideration without notice; because the possession of the bill of lading by the consignee makes him the visible owner of the goods, and would enable him to commit a fraud on a third person: such was the case of *Lickbarrow* and *Mason*. But it seems to me that there are particular circumstances in this case which distinguish it from that; because it appears upon the contract made on the 21st of *March*, that the plaintiff made himself a complete partner with *Hague* *quoad* this transaction. And he not only made himself a partner, but by the terms of the contract he made himself the paymaster; therefore he put himself in the place of the original consignee, and must take the bill of lading subject to the same rights. That being the case, it follows as a necessary consequence that the defendants had a right to stop the goods *in transitu*. And it would be a very hard case if he had not that power; for the plaintiff has not in fact been deceived; since though *Hague* acted



acted as the visible owner, yet it appears on the agreement that he had not paid for them.

1788.

BULLER, J.—It has been uniformly laid down in this Court, as far back as we can remember, that good faith is the basis of all mercantile transactions: and therefore it is material in questions of this kind to consider whether the purchaser has acted fairly and honestly, or with a design to deceive and defraud. The first case on this subject is that of *Snee and Prescott*, and that has never been impeached in the smallest degree; but on the contrary it has always been mentioned by the Court with approbation. But still it is to be remembered that that case only relates to a transaction between the buyer and seller of the goods; and in the case of *Lickbarrow and Mason*, it never was the intention of the Court to use a single expression that could impeach that authority. If the transaction be between the buyer and seller of the goods, and the former has not paid for them, the latter has a right to stop them *in transitu*, in case of the insolvency of the other. The case of *Snee and Prescott* went no farther than that: but in *Lickbarrow and Mason*, and some other cases, the Court has been obliged to consider whether in conscience that rule ought to be extended to other parties; and they have held that it ought not, because it would put it in the power of the consignor to enable the consignee to cheat an innocent third person. He who contracts on the faith and credit of the bill of lading shall not be divested of his right. But still the criterion is, does the purchaser take it fairly and honestly? On that principle the case of *Wright and Campbell* turned; there the Court thought there was abundance of evidence to be left to a jury to shew that the party, who took the bill of lading, had full notice that the goods had not been paid for. That circumstance had slipped the attention of the learned Judge who first tried the cause: but on a motion for a new trial, the Court thought that they saw reason to suspect fraud between the factor and the third person to cheat the real owner of the goods. So in this case, if the plaintiff knew at the time that *Hague* had never paid for the goods, it was an agreement between those two to obtain possession of the goods without paying for them. And the fact of the plaintiff's knowledge appears on the face of the agreement itself, for he there agrees to pay for them himself. But there is still another ground which would prevent the plaintiff's recovering in this action; for there is no doubt but that

SALOMONS  
against  
NISSEN.



1788.

SALOMONS  
against  
NISSEN.

that under this agreement the plaintiff and *Hague* were partners; and then the plaintiff could not recover in this form of action. That is like a case which I argued here many years ago of *Fox and Hanbury* (a), where it was held that if one partner became a bankrupt, and the other partner afterwards disposed of the goods, and he then became a bankrupt, the assignees of both under a joint commission could not bring trover against the vendee of such partnership effects. Now that applies to the present case. And on both grounds I am of opinion that the *possea* must be delivered to the defendants.

GROSE, J.—It never was my intention, in the case of *Lickbarrow and Mason*, to throw the least doubt on that of *Snee and Prescott*, and other cases, which have held that the confignor of goods may obtain the possession of them before they reach the consignee, who becomes insolvent before payment. But in *Lickbarrow and Mason* a third person intervened. There a fair and *bonâ fide* purchaser of the goods under a bill of lading differed that case from the others, which were only between the original parties. The only ground on which this case can be supported is by likening it to that of *Lickbarrow and Mason*; but I think it is totally unlike. I agree with the counsel for the defendants in considering the money paid by the plaintiff to *Hague*, as in reality a loan to permit the plaintiff to enter into partnership with him: if so, the plaintiff must stand in the situation of *Hague*, who knew the whole transaction, and that the goods were not paid for, and so it comes within the principle of *Snee v. Prescott*. The agreement also shews that the plaintiff himself knew that the goods were not paid for, and that he actually agreed to pay for them; so that he stands precisely in the same situation as the original purchaser of the goods. I agree also with my brother *Buller* on the last point: the plain intention of that agreement was, that the plaintiff and *Hague* should become partners in the goods, and then one partner could not recover those goods which the other could not.

*Possea* to the defendants.

(a) *Corp.* 445.



1788.

WHITTER and Others, Assignees of a Bankrupt,  
against CAZALET and Others.

Friday,  
Nov. 14th.

**T**HIS was an action of trover for goods by the assignees of the bankrupt; and the question being whether they were or were not sold,

*Baldwin*, on the part of the defendant, moved for leave to inspect the bankrupt's sale books. He observed that though there was not perhaps any instance of such a motion to be found, yet in actions on policies of insurance the Court had frequently permitted the underwriters to inspect all letters and papers directing the assurance, in order to prevent the expence attending an application to the Court of Chancery for a discovery.

The Court doubted whether they had power to grant such a motion: but, as a discovery might be obtained in the Court of Chancery, they said the regular way was to stay the proceedings here till the party had an opportunity of making such a discovery. A rule was therefore made to shew cause why the defendants should not have till the first day of next term to plead, unless the plaintiffs would produce the books in the mean time, in the course of which time the defendants would have an opportunity of obtaining an answer in Chancery; and this rule was afterwards made absolute, after cause shewn.

In trover for goods, where the defence is that they were sold by the plaintiff, the Court will give the defendant time to plead, in order that he might have time to obtain a discovery from the Court of Chancery in the mean while.

The KING *against* BUNTS and Others.

Saturday,  
Nov. 15th.

**T**HE defendants, who had been convicted of a conspiracy, were brought up for judgment on *Friday, November the 14th*; and, it being disputed at the bar whether the counsel for the prosecutor or the prisoners should begin, the Court thought it proper, in order to obviate this difficulty for the future which had perpetually occurred, to make a general rule for that purpose, without prejudicing the rights of the parties in this indictment; and on this day

Lord KENYON, Ch. J.—said, that the Court, after consideration, had resolved to adopt the following rule. When any defendant shall be brought up for sentence on any indictment, or information, *after verdict*, the affidavits produced on the part



1788.

The KING  
against  
BUNTS.

of the defendant, if any such are produced, shall be first read, and then any affidavits produced on the part of the prosecution shall be read; after which the counsel for the defendant shall be heard, and lastly the counsel for the prosecution.

And when any defendant shall be brought up for sentence after judgment *by default*, the prosecutor's affidavits shall be first read, then the defendant's affidavits; after which the counsel for the prosecution shall be heard, and lastly the counsel for the defendant.

If no affidavits shall be produced, the counsel for the defendant shall be first heard, and then the counsel for the prosecution.

Tuesday,  
Nov. 18th.

DOE on the several Demises of HODSDEN against  
STAPLE.

If there be an agreement before marriage, that a settlement shall be made of the wife's estate, reserving to her a power of disposing of it, which agreement is signed by the intended husband and wife but *not sealed*, and before the marriage the wife disposes of it to the husband who survives her, and devises the estate by will, the title of his devisee is such a doubtful equity as cannot be set up in an ejectment against the title of the wife's heir at law.

THIS was an ejectment brought last *Hilary* Term to recover certain premises in *Tatsfield, Surry*. And in the declaration three demises were laid; the first on the 10th of *October* 1768, for 31 years; the second on the 16th of *November* 1777, for 21 years; and the last on the 12th of *November* 1787. At the trial at *Guildford*, before Lord *Loughborough*, the jury found a special verdict, stating in substance as follows: On the 23d of *August* 1758, *Richard Staple*, now deceased, was seised of the premises in tail general, subject to a term of 99 years, outstanding in *A. Culver*, in trust for securing four several life annuities to *Sarah Dixie, Joseph Cox, Mary Curwen, and Mary Day*; which term was determinable on the death of the survivor of the said annuitants, and subject to the said annuities was limited in trust to attend the inheritance; the reversion being vested in *Catherine Culver*. On the same day and year *Catherine Culver*, in contemplation of a marriage with *James Hibbins*, signed a paper writing *without seal or stamp*, produced at the trial, which, after reciting the intended marriage, and that *Catherine Culver* was entitled to a considerable property both real and personal, stated that it was agreed, "That the  
"said *Catherine Culver's* fortune shall be settled or remain to

In ejectment the plaintiff must recover on a legal title. A satisfied term may be presumed to be surrendered, but an unsatisfied term, raised for the purpose of securing an annuity, during the life of the annuitant cannot, and may be set up as a bar to the heir at law, even though he claim only subject to the charge

" their

See 1. vol.  
150. p. 7.  
vol. 2.



IN THE TWENTY-NINTH YEAR OF GEORGE III.

685

1788.

DoB  
against  
STAPLE.

“ their joint use for her life, or the life of the longest liver, and  
“ if she shall survive the said *James Hibbins*, her whole for-  
“ tune, together with her plate and jewels, to be settled to her  
“ own use; And if the said *Catherine Culver* shall happen to die  
“ first, then the aforesaid fortune to be at her own disposal;” and  
it was agreed that proper settlement deeds to this effect should  
be prepared as soon as it could conveniently be done. A dupli-  
cate of this paper, without seal or stamp, was signed by *James  
Hibbins*. On the same day and year *Catherine Culver* made her  
will, duly executed to pass real estates, and after giving “ the  
“ whole interest of her fortune to *James Hibbins* her intended  
“ husband” for life, and after several specific devises in which  
the reversion in the premises in question was not mentioned,  
devised the residue of her estate and effects to the said *James  
Hibbins*, whom she appointed her executor. On the same day  
and year the marriage took effect; and on the 7th of *April*  
1759, *Catherine Culver* died, without issue, in the life of her  
husband, and of the said *Richard Staple*; leaving *Mary Bra-  
zier*, (who afterwards died in the life-time of *Richard Staple*)  
and *Richard Hodsdon*, the lessor of the plaintiff, her co-heirs.  
On the 9th of *October* 1768, *Richard Staple* died without issue,  
leaving only one of the annuitants, *Sarah Dixie*, surviving him.  
On his death *James Hibbins* entered, claiming the premises  
under the agreement and will of his wife, subject to the annuity  
to *Sarah Dixie*. On the 7th of *October* 1777, *James Hibbins*  
died, having devised the premises to *James Lloyd* for life with  
remainders over. After his death *James Lloyd* entered, claim-  
ing title subject to the annuity. On the 14th of *November*  
1786, *Sarah Dixie* died, and the term of 99 years determined.  
The said *Richard Staple*, *James Hibbins*, and *James Lloyd*,  
regularly paid the annuity; and the trust of the term was satis-  
fied at the time of the death of *Sarah Dixie*. The special ver-  
dict then stated that *Richard Hodsdon*, after the death of *Richard  
Staple*, to wit, on the 9th of *October* 1768, as heir of *Catbe-  
rine Culver*, claiming title to the premises, subject to the said  
annuity payable to *Sarah Dixie*, entered and ejected the said  
*James Hibbins*, and was seised of the premises; and being so  
seised, demised to the plaintiff as mentioned in the first count,  
by virtue whereof the plaintiff entered and was possessed till the  
defendant as servant of the said *James Hibbins* ejected him.  
That the said *Richard Hodsdon*, after the deaths of the said

*Richard*



1788.

DOE  
against  
STAPLE.

*Richard Staple* and *James Hibbins*, to wit, on the 5th of November 1777, mentioned in the second count entered and ejected *James Lloyd*, was seised subject to the annuity, and demised to the plaintiff, who entered and was possessed till the defendant as servant of *James Lloyd* ejected him. That the said *Richard Hodsdon*, after the deaths of the said *Richard Staple* and *James Hibbins*, and after the determination of the trust term, to wit, on the 12th of November 1787, entered and ejected *James Lloyd*, was seised, and demised to the plaintiff, who entered and was possessed, till the defendant as servant to *James Lloyd* ejected him. But whether upon the whole, &c.

*Marryat* for the plaintiff. The marriage of the testatrix, Mrs. *Culver*, subsequent to the making of her will, was by operation of law a virtual revocation of it; First, because her estate and interest in the lands was changed by it; and Secondly, because the testatrix's capacity of revoking and altering the will in fact at her pleasure was determined by the marriage. That the marriage of a feme sole is a revocation of her will, as a general proposition of law, appears from a variety of concurrent authorities. In *Forse v. Hembling* (a), which happened very soon after the statute of wills, it was expressly determined that where a woman makes a will, and then marries, the marriage puts an end to the will. So in *Cotter v. Layer* (b), it was said by Lord Chancellor *King*, without any qualification, that a woman's marriage is alone a revocation of her will. The same doctrine was also held in Mrs. *Lewis's* case (c), before the Delegates; and is recognized by the late Mr. Justice *Blackstone* in his Commentaries (d). And the statute of frauds, which is subsequent to the decision of *Forse* and *Hembling*, having expressly provided that no revocations by operation of law should be affected by the act, seems to be a legislative recognition of that decision. First, the marriage of Mrs. *Culver* was a revocation of her will, on account of the alteration of the interest in her freehold property. In order to give effect to a devise of lands, it is requisite that the estate and interest of the party devising should remain in the same state from the time of making the will till his death. For as was said by Lord *Hardwicke* in *Sparrow v. Hardcastle* (e), "any alteration or new modelling  
" will make it a different estate, and occasion a different con-

(a) 4 Rep. 60. b. Gouldsb. 109.

(b) 2 P. Wms. 624.

(c) 4 Burn. Eccl. c. 47.

(d) 2 Bl. Com. 499.

(e) 3 Atk. 803.

" struction



"struction at law, unless in some exceptions." If a testator, after making his will, make a feoffment to the use of himself in fee, it is a revocation. 1 Ro. Abr. 615. l. 50.; and this is adopted by Lord Hardwicke in *Brudenell v. Boughton* (a). A feoffment even to the use of the will is a revocation of an antecedent will. 1 Ro. Abr. 614. l. 32.; and confirmed in *Pollen v. Huband* (b). So if a party make any conveyance, either by fine, feoffment, recovery, release, &c. and takes back a new estate, or even an old use unaltered, it is a revocation. *Parsons and Freeman*, 1 Wilf. 308. 3 Atk. 741. *Darley v. Darley*, 3 Wilf. 13. Even an imperfect conveyance is so, or articles, if for a valuable consideration. A feoffment, defective for want of livery; a grant of a reversion, defective for want of attornment; a bargain and sale, defective for want of enrolment, have all been held to be revocations of wills. *Com. Dig. Fitz. Devise F.* And Lord Lincoln's case (c) is still stronger; there the Earl, after having devised his estate to Sir Henry Clinton who succeeded him in the earldom, upon an idea that he should be married to a particular lady, although no treaty had ever been on foot, made a conveyance to the use of himself in fee until the marriage, and after the marriage to other purposes, and died without altering his will; and this was held a revocation of the will, and let in the heir at law. This case was cited and relied upon by Lord Hardwicke in *Parsons and Freeman* (d), and recognized as law by Lord Mansfield in *Doe dem. Gibbons v. Pott* (e). Now in the present case a material alteration of the testatrix's estate took place between the time of her making the will and her death. At the time of making her will, she alone had a legal remainder in fee, expectant on the determination of the estate tail in *R. Staple*; under the agreement she took an estate jointly with her husband, and if the agreement be operative, the husband took an estate for his own life, as survivor; and she parted with the exclusive power and control which she had over her freehold property previous to her marriage. And it is material to observe that this agreement could not have been carried into execution by any mode that would not have operated as a revocation of the will; for it must have been done by a fine after marriage, which has repeatedly been decided to be a revocation. Secondly, the marriage was a revocation of the will,

1788.

DOE  
against  
STAPLE.

(a) 2 Atk. 273.

(b) 1 Eq. Cas. Abr. 412.

(c) Cas. in Parl. 157.

(d) 1 Wilf. 312.

(e) Dougl. 722.



1788.

Doe  
against  
STAPLE.

because the testatrix's capacity of revoking or altering that will was determined by her marriage. The party, making a will, must not only be testable at the time of making it, but must also continue so till death, except in one instance in respect to the visitation of God. In *Forse* and *Hembling* (a) although it is admitted that if a man of sane memory make a will, and afterwards become insane, it is no countermand of the will; and the reason is there given, because it is done by the act of God: but marriage is the voluntary act of the party, and amounteth in the case of a woman to a countermand of her will. The same doctrine is to be found in *Swinburne*. This general rule cannot be denied: but perhaps it may be contended that the agreement before marriage distinguishes this case from the general rule. If it be so contended by the defendant's counsel, it will be material for him to consider, First, whether that instrument communicates any power of making a different will even *after her marriage*, and would have given effect to any such subsequent will; Secondly, whether, even if so, the will made *before marriage* could operate without republication; Thirdly, whether a will made before marriage is within the power given by the agreement; and Fourthly, whether, if the instrument had contained an express stipulation that her will before marriage should be valid notwithstanding her marriage, such a contract could have obviated the legal operation as against her heir at law, however binding it might have been upon the husband. But in the first place, no power is or could be raised by the agreement. It is a mere instrument without seal, without stamp, and without any of the requisites of a legal conveyance or deed. But even if it were a deed, it could only amount to a covenant to stand seised to the uses there specified, as there is no transmutation of possession; and it is a decided rule of law that no general unrestrained authority either of disposition, or even of granting leases, is well raised by a mere covenant to stand seised, although such authorities may be limited by a fine, or conveyance that operates by transmutation of possession. It has even been decided that a *leasing power*, raised by covenant to stand seised, will not authorise a lease to *one of the blood*; because as the power was to lease to any person indefinitely, it is void in its creation. *Mildmay's case*, 1 Rep. 176. The same doctrine was laid down in *Cro. Jac.* 180. In *Perrot's case* (b), it is said "upon a cove-

(a) 4 Co. 60.

(b) *Maar.* 381.



"nant to stand seised, a man cannot reserve a power to make leases or jointures, but upon estate executed he may." That this agreement could not even prevail in a court of equity, is clear from the case of *Peacock and Monk* (a). And in a court of equity there seems to be this distinction, that although it will supply a defect of circumstance in the execution of a power, it will never supply a defect in the creation of one. *Warwick v. Gerrard*, 2 Vern. 7. This case at the best is only a doubtful equity on behalf of the defendant; for after the elaborate argument in the cause in Chancery between these very parties about a year ago, the present Lord Chancellor expressed a strong inclination in favour of the lessor of the plaintiff's claim: but if it be even a doubtful equity, this Court will not interpose against the legal title. But even admitting that under the agreement a power could be raised for Mrs. Culver to make a new will, it is contended, in the second place, that the will made before marriage cannot have any operation without a republication after marriage. In Mrs. Lewis's case (b) it was decided that a will made by a woman before marriage is so totally revoked by her marriage, that it could not revive on the subsequent death of her husband; and surely a woman acquires as complete a power of making a new will on her husband's death, as Mrs. Hibbins could possess by virtue of this agreement. It has also been determined that, where a testator by a second will revokes his first, the cancelling of the second will does not set up the first, which was revoked by it; 3 Atk. 798. From whence it seems, that a will once revoked can never be revived without a republication. In the third place, supposing the agreement to amount to a power, still the words are not applicable to a will made before marriage. The intent of the agreement appears to have been that deeds should be executed, giving the testatrix a power of disposition, to be executed not only after the marriage but even after the deeds. But in the fourth place, such a power could not have had any legal operation against the heir at law. The intentions and the contracts of parties can prevail only so far as they are consistent with the rules of law, but cannot contravene them. The cases of conveyances to the use of the parties' wills, already cited, left no room to suppose that the parties meant to revoke their wills. And in *Marwood v. Turner* (c), where a person seised in tail, with a remainder

1788.

Doe  
against  
STAPLE.

(a) 2 Vez. 191.

(c) 3 P. Wms. 163.

(b) 4 Burn. Eccl. c. 47.



1788.

—

DOE  
against  
STAPLE.

to himself in fee, after having made his will, levied a fine with a view of giving effect to it, and died without issue, the fine was held a virtual revocation of the will which it was intended to confirm.

If then the plaintiff be entitled to recover, the next question is on which of the courts judgment should be given in his favour; in the consideration of which it may be material to attend to the different dates of the demises in the different counts in the declaration. The first demise is on the 10th of *October* 1768, being the day after the death of *Richard Staple*, the tenant in tail, upon whose decease the reversion which had been vested in *Mrs. Culver*, the testatrix, fell into possession, subject to the remaining annuity to *Mrs. Dixie*. The second is on the 16th of *November* 1777, a short time after the death of *Dr. Hibbins*, so as to be adapted to the title of the lessor of the plaintiff in case the *Dr.* should be thought entitled to an estate for life, and the Term for securing the annuities should not be deemed a bar. The third is on the 12th of *November* 1787, which is subsequent to the death of the last annuitant and the determination of the term. With respect to the first, it may perhaps be too much to contend that *Dr. Hibbins* did not take a life estate under the agreement; for if he took a clear equitable estate for life, the Court of Chancery may compel the plaintiff's lessor to pay costs in equity for taking a larger judgment at law than he is equitably entitled to; and therefore this may be abandoned, and the plaintiff will consent that a verdict should be given against him on this count, on the ground that a court of equity will consider every thing as done which in equity ought to be done. But the term of 99 years, which was subsisting at the time of the two first demises for the *particular purpose of securing the annuities*, can be no bar to the plaintiff's recovery upon the second demise. For it has been repeatedly settled that a lessor of a plaintiff shall not be turned round by a lease paramount his title, if he does not mean to disturb the tenancy; and that a reversionary interest, *subject to a right of present possession in another*, is recoverable in an ejectment. Now it is expressly found by the special verdict that the lessor of the plaintiff claimed *subject to the remaining annuity*, and consequently did not mean to disturb it; the term of 99 years, which was created for that purpose only, cannot therefore be set up by a third person, who derives title through the same



IN THE TWENTY-NINTH YEAR OF GEORGE III.

proprietor as the lessor of the plaintiff. The case of *Doe dem. Bristow v. Pegge*(a) is a decisive authority on this point: the Court there were unanimously of opinion that the outstanding terms, which were clearly unsatisfied, and which the plaintiff submitted not to disturb, could not be set up as a bar to the ejectment by the defendant, whose own title appeared to be subject to the same incumbrances. And here the objection of the outstanding term is less forcible than in the case of *Bristow and Pegge*; because this is for the purpose of securing an annuity only, and there is no mortgage term as there was in that case; and an annuitant is not, like a mortgagee, entitled to apply the whole profits of the estate in diminution of his demand. Besides, upon a principle of substantial justice, the lessor of the plaintiff in this case ought not to be barred by the term from recovering upon the second count; because, if the verdict should be entered upon the last count only, he will be precluded from the surplus of the mesne profits after payment of the annuity: whereas if judgment should be given for him upon that count, the defendant will suffer no injury, inasmuch as in any subsequent proceedings for mesne profits, he will have credit upon the record of the recovery in ejectment (which will be indispensable evidence in support of such proceedings) for what he has paid on account of the annuity, and be chargeable only with the balance in his hands.

*Shepherd*, for the defendant, admitted as a general principle, that if a feme sole make a will, and afterwards marry, the marriage is in law a revocation of the will, if she die during the marriage; but contended that in this case the will was a due execution of the power contained in the agreement. The reason given in *Forse and Hembling*, that, if marriage were not held to be a revocation of a will, it would be making a will irrevocable, forms an exception in favor of this very case. A will has three different stages, its inception, its ambulatory state during the testator's life, and its consummation at the death of the testator: And in that case though the will was good at its inception, yet as the testatrix was a feme covert at its consummation, it could not have any effect, because she was supposed in law to be under the constraint of her husband: but in this case that reason does not exist, and by the positive stipulation of the parties, which is now to be construed as a deed, on the ground that

(a) *Ante* 1 Vol. 758.

691  
1788.  
Doe  
against  
STAPLE.



1788.

Doe  
against  
Staple.

equity will consider as done that which ought to be done, the testatrix, Mrs. *Hibbins*, had the power of revocation by having the power of making her will notwithstanding her coverture. And where a will is good at the time of its inception and its consummation, it is indifferent what becomes of it during its ambulatory state. For *Marwood* Serjeant said, in *Brett v. Rigden* (a), "If a feme sole make her will the 1st of May, and give lands thereby, and afterwards the 10th of May she take husband, who dies the 20th of May, and afterwards the woman dies the 30th of May, the devise is good; and yet if it should be considered according to the time of the date, the will would be countermanded by the espousals: but it is not so, for it does not take effect until her death, at which time she was discoverd as she was at the time of making the will; and the inter-marriage shall not countermand that which was of no effect in her life time." This has been adopted in several cases. Now here the testatrix had power to make a will, and at the time of her death she was discoverd to that purpose. So in *Godolphin*, on last wills (b), it is said also, if a testament be made by a woman before marriage, and she outlive her husband, it shall be good. And though by the statute 34 & 35 Hen. 8. c. 8. femes covert are disqualified from devising lands, it has been constantly determined that they may have a power given by settlement of disposing of lands by writing in the nature of a will, which shall be construed according to the rules of construction relative to wills. *Duke of Marlborough v. Ld. Godolphin* (c), and *Southby v. Stonehouse* (d). [Lord Kenyon observed that the first was an appointment of money; and the other a conveyance to uses.] This must be considered as a good execution of the power. The commencement of the power must have reference to the time of the creation; and no time being limited when the act is to be done, it may be done at any time after its creation. The word "then" in the agreement cannot have reference to time, but it means "in case;" for otherwise she could not execute the power till she was dead; like the case of *Thomlinson v. Dighton* (e). If then it's being to take place does not confine it to be by will, neither shall it be confined to the time, or

(a) *Plowd.* 343.(b) *Page* 29.(c) 2 *Vez.* 75.(d) 2 *Vez.* 610.(e) *Salk.* 239.

after



after marriage. This is a collateral power like that of *Thomlinson v. Dighton*; and therefore when once created, it is of no importance in what condition the person having the power was when she executed it. If a subsequent marriage would not prevent her executing it, neither shall her being a feme sole do so. Suppose the marriage had not taken place, the will would have been good; surely then the marriage shall not destroy that done before, which she would have had a power to do after. The will in its contents is consistent with the power. The agreement was to give an estate for life to Mrs. Culver and Dr. Hibbins, and the survivor, and she was to dispose of the fortune if she died first. She gave nothing by her will till after his decease, for she ratified the settlement. Or this may be taken as a covenant by the wife to stand seised to uses: she had the great requisite of seisin of the covenantor at the time; and if this had been done by deed (and it must now be so taken) it would operate as a good covenant to stand seised to the use of herself and her husband for life; and then the disposition to the husband under the power must be good. The cases, which have been cited to shew that the marriage must operate as a revocation of the will of Mrs. Hibbins, do not apply to this case. For revocations, which are not expressed by the parties, must be implied by law; and when implied, they may be rebutted by extrinsic circumstances. An implied revocation is only a presumption of the change of intention from a change of situation; one change of situation, from which a revocation may be implied, is marriage and the birth of a child. And in *Brady and Cubitt*, Lord Mansfield (a) said "there was no case where marriage and the birth of a child have been held to raise an implied revocation, where there has not been a disposition of the whole estate." In the present case, therefore, the presumptive revocation is rebutted by the circumstance of the testatrix having provided for her intended husband by will. With respect to the other question, from what time the plaintiff is intitled to recover: The plaintiff's title to the possession did not accrue till the determination of the term for 99 years. It has been said that a clear trust estate shall not be set up against the *cestui que trust*; but according to what Lord Mansfield said in *Brislow and Pegge*, that must be taken to mean a mere

1788.

DOE  
against  
STAPLE.

(a) Dougl. 39.

trust



1788.

DOE  
against  
STAPLE.

trust for the party bringing the ejectment. But where the trust is raised, and subsists, for the benefit of other persons, if a court of law were to interfere, it would totally destroy the trust, not having power specifically to relieve. Now here the lessee for 99 years was a trustee for annuitants, and unless he had a right to the possession, he could not perform his trusts: otherwise suppose the annuitants had not been regularly paid, and the lessor of the plaintiff had taken possession, he could not have been ejected. But the purpose of creating this term was that the lessee should have possession to secure the annuities. During the term therefore the heir at law had no right to the possession. One reason given in the case of *Bristow* and *Pegge* was that the trustees did not set up the term against the heir at law; if they had, the plaintiff could not have recovered. Now here the term was satisfied at the time of the trial, and therefore could not have been set up by the trustee; but it does not follow that he would not have set it up, if an ejectment had been brought during the lives of the annuitants. And the last annuitant being alive at the time of the demise in the second count, the plaintiff can only recover on the last count.

*Marrya* in reply. The whole of the defendant's argument proceeds on a supposition that the testatrix had the power of making the will; but no case or authority has been cited in support of such doctrine, and it was even contrary to the agreement itself in this case. A feme covert can only execute an appointment, not make a will; this is the language of a court of equity in all such cases. The agreement in this case operates as a revocation of the will in law; and though a presumptive revocation may be rebutted, yet there is no case which says that a virtual revocation may be so. In *Marwood v. Turner* (a) where a tenant in tail male, with remainder to himself in fee, devised lands to J. S., and then suffered a recovery to the use of himself in fee, and died without issue male, it was held to be a revocation of the will. As to the case in *Plowden*, the passage which has been cited was only the argument of counsel, which was over-ruled by the Court, as appears in the same report. With respect to the second point; as in a real action, a judgment may be recovered with a *cesset executio* during the term, so in this case, if the plaintiff were to recover, he would not interfere with the annuity, as he only claims subject to that

(a) 3 P. Wms. 163.



charge. Besides, the trustee for the term has no right to the possession of the whole estate on account of the annuity.

1788.

DOE  
against  
STAPLE.

Lord KENYON, Ch. J.—The lessor of the plaintiff has now united in him all the rights of the two co-heirs of *Catherine Hibbins*; and therefore he is intitled to recover the premises in question under one or other of the counts in the declaration, unless the will and the instrument of the 23d of *August* 1758 defeat his title. Some of the principles which have been discussed at the bar are not to be disputed; there is no doubt but that the will of a woman made before coverture ceases to be her will afterwards; because it is of the essence of a will that it should be valid during the remainder of the devisor's life. Therefore, generally speaking, the will of a feme sole ceases to have any operation after she becomes covert. But it is equally clear that, where an estate is limited to uses, and a power is given to a feme covert before marriage to declare those uses, such limitations of uses may take effect; and this is the rule even in a court of law. Then as to this case now before us; this will, *quasi* a will, standing unsupported, would certainly have no effect: but it has been argued that it receives support from the instrument; but it must be remembered that that instrument is no deed; it is not under seal, and a seal is essential to a deed. Therefore it cannot operate as a covenant to stand seised to uses. Then consider how the general doctrine stated by the plaintiff's counsel from the case of *Peacock* and *Monk* applies; Lord *Hardwicke* there points out several ways by which a power may be reserved to the wife of making a disposition of the estate so as to prevent its going to the heir at law, namely, either by way of trust, or of power over an use: but he doubted whether even a court of equity could carry into execution a bare agreement for that purpose to the prejudice of the heir at law: However that, which was then considered as a doubt, no longer remains so. For in *Wright v. Lord Cadogan* and others (a), it was determined that a court of equity would compel the heir to make a conveyance to the party in whose favour such an agreement was made. That point was very ably discussed in the House of Lords, on the doubt which Lord *Hardwicke* had thrown out in *Peacock* and *Monk*, though his doubts were not sufficient to induce the House to determine against such an agreement. But is it possible for a court of law to enter into

(a) 6 Bro. Parl. Cas. 156.



1788:

Doe  
against  
STAPLE.

*Leave into the  
force of this reason,  
it depending on the  
circumstances of the  
case, whether such  
a presumption  
is founded. It is to  
presume, that the  
term is now gone  
by surrender, merely  
because it is inequi-  
table to make use of  
it against the legal  
title, seems to be  
inconclusive rea-  
soning. See however  
Lord Kenyon's words  
in 7 Term Rep. B. R.  
3.*

the discussion of such nice points of equity? we have no such authority. Sitting in this court we must look at the record, and see whether a legal title is conveyed to the party claiming under these instruments: now there is no colour for saying that these give any legal title. Without deciding or presuming to think what a court of equity would do in this case, it is enough for me to say that we are to decide a legal question, and cannot enter into such an entangled equity: and on that ground only, I am of opinion that the plaintiff is entitled to a verdict. The next question is, on what count in the declaration the verdict shall be taken; and here again we must remember that we are in a court of law. I extremely approve of what was said by Lord Mansfield in the case of *Lade v. Holford* and another (a), that he would not suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct a jury to presume a surrender: I much approve of that; and when a surrender is presumed, there is an end of the legal title created by the term. But here the facts of the case preclude any such presumption: there was an existing term at the several times of the two first demises laid in this declaration, and a considerable benefit was to be derived out of it: the last annuitant did not die till after the time of the second demise; therefore there is no reason to presume that the trustees had surrendered, and they would have been personally liable if they had. Supposing two ejectments had been brought at the same time before the death of the last annuitant, the one by the trustees of the term, and the other by the present lessor of the plaintiff; the Judge could not have directed the jury to find for both; but the trustees must have recovered, for they would have shewn a legal title. The jurisdiction of this court in ejectments is confined to legal titles, taking care that they do not intrude on the rules of law, nor discuss equitable titles. In real actions there is no doubt but that the party must state a legal title on the record; then it would be absurd that, respecting the manor of *Dale* on a special verdict in *formedon*, the decision must necessarily be given according to the strict legal title; and that, respecting the manor of *Sale*, on a special verdict in ejectment, there must be a contrary judgment. In this case it is impossible to suppose that there was a surrender of

(a) 3 Burr. 1416. 2 Bl. Rep. 428. Bull. N. P. 410.



the term, or that it was satisfied, because the verdict finds the contrary fact. Therefore, I am of opinion that judgment must be given only on the last count in the declaration, after the death of the last annuitant.

1788.

Doe  
against  
Staple.

ASHMURST J.—It is admitted that *prima facie* the title of the plaintiff in this ejectment is clear, unless it be affected by the will or marriage agreement of Mrs. Hibbins: now I am of opinion that his title is not to be affected by either of those instruments. With respect to the general question whether when a feme sole has made a will, and afterwards marries, such subsequent marriage does not operate as a revocation of the will: The marriage must have that operation, because a will supposes a disposing power at the time in the person making it, and that it shall be always afterwards subject to his control: but that is not the case with a woman after coverture; for when she enters into that engagement she gives up the right to her own property. Then it has been attempted to substantiate the will by connecting it with the marriage agreement: but I think it cannot be so connected with it as to give it any effect; for by the express terms of the agreement her fortune was to be settled to her and her husband jointly, and the survivor of them, “and if she survived her husband, then her whole fortune was to be settled to her own use;” from whence the defendant’s counsel would infer a power in the marriage agreement to make a will. Even allowing that to be the case, and that, in planning the settlement, estates might have been conveyed to uses, which uses would have been subject to her control by way of appointment, yet that agreement clearly refers to an executory act, and not to a will made prior to the marriage. It might have been a great doubt whether it could have been agreed that the marriage should not revoke the will, even if there had been words for that purpose, because it would be a stipulation in direct opposition to a positive rule of law. For if the agreement referred to the will then in existence, still the will would want a necessary ingredient, namely, a disposing power by the party making it during the whole time. However it is not necessary to decide that point here, because the agreement itself refers to an executory act. As to the second question; I think judgment must be given on the third count only, because during the existence of the term the heir at law was not entitled to recover.

BULLER, J.



1788.

Doe  
against  
Stable.

BULLER, J. — On the first question I agree with my Lord Chief Justice and my brother *Abbott*, that the plaintiff is entitled to recover in this ejectment. It is material to consider the situation in which these two parties stand: the plaintiff has no connection with the estate or interest which the defendant claims; his title is adverse to him; an agreement was made before marriage between *Catherine Culver* and her intended husband, and it has been attempted to connect it with a will made by her before marriage, under which the defendant claims: but at best that raises only a doubtful equity; and the title of the plaintiff being clear, the defendant cannot keep him out of possession by a doubtful equity. But on the second point, I am sorry to be under the necessity of differing from the opinion which has been given. It is a question of the most serious importance to the public in general, whether that shall still be considered as law, which has undoubtedly been received as such for thirty years past; or whether in all cases, as between the trustee and the *cestui que trust*, or between the person entitled to the profits of the estate and him who is intitled to certain incumbrances on it, we must abide by the strict letter of the law, and say that, if there is any legal outstanding term, the lessor of the plaintiff shall not recover. In the first place, the case of *Doe dem. Bristowe v. Pegge* goes directly to this point. In that case there were outstanding incumbrances; but as neither party affected to disturb, but admitted, them, and as the trustees did not assert their title, the court would not permit the term, which was created for securing those incumbrances, to be set up to nonsuit the plaintiff. Suppose the estate in this case had been of the annual value of 1000*l.*, and the charge upon it had only been 20*l.* *per annum*, which was to be raised by a term, the heir at law would be entitled to have the management of the estate, and to improve it, and to have all the profits except that charge; and if he did not intend to disturb that charge, I think the term ought not be set up against him; for why should he be deprived of that to which he is entitled? This case in its consequences will go a great way to overturn that which has been considered as settled law in a variety of cases, where it has been held that, though the immediate possession may belong to some other person, yet provided the lessor of the plaintiff claims under the same title with the defendant, and acknowledges that the person who made the defendant's lease had a right to make it, and does not



1788.

Doe  
against  
STAPLES.

not mean to disturb it, but is only desirous of being put into the receipt of the rents and profits of the estate, the ejectment may be maintained: otherwise where the title is disputed between the heir at law and the devisee, and there is a lease for 21 years in existence, neither of them could get into possession. But all these cases must fall to the ground, if it were sufficient to find out some term outstanding in a third person, and set it up as a bar to a recovery in ejectment. Again in the case of a mortgage, shall a mortgagee be compelled to take possession whether he will or not? It is contrary to the intention of the parties. He only takes the legal estate as a security; if it were otherwise, no person would lend his money upon such terms. A mortgagee would say that he would have nothing to do with the management of the estate; and if he is unwilling to take the estate, shall it be competent to a third person to compel him? So where portions for younger children are to be raised, if they, who are probably at a distance from the spot, are content that the eldest son shall have the estate, shall they or their trustees be compelled to take possession and hold it against the head of the family? Very serious mischiefs will follow from such a determination. The question then is whether we are going too far in a court of law in preventing the legal title from being set up as a bar to a recovery in ejectment in such cases; if we are, we must determine that a court of law is totally incapable of examining a question of trust, and indeed of deciding whether it be a trust or not: but if we are to do that, we must overturn every case upon the subject from the time of *Littleton* down to the present hour. *Littleton* (a) says, that the *cestue que use* shall serve in assizes and other inquests, and this by the common law: for that *the law* wills that the feoffors and their heirs ought to occupy and take the profits as if the lands were their own without interruption of the feoffees. In that instance, courts of law are bound to enter into the question of trust, and say what effect it shall have. On looking into the statute of 27 *Henry 8. c. 10.* it seems strange that any doubt should ever have been made concerning the true construction of it. Not that I mean to overturn any of the cases which have been determined on the distinction between uses and trusts as to the limitations of real estates. They have been decided; and for the sake of certainty must be adhered to. For the same reason I think what has been considered as settled

(a) *See* 464.



1788.

DOE  
against  
STAPLE.

law for thirty years past ought not now to be departed from. But when the statute said that all uses and trusts should be executed, it seems strange that any distinction should have been afterwards made even in a court of law. It was not perhaps much to the credit of the times that such a distinction was ever made: and, as Lord *Hardwicke* said, this act of parliament, which was passed with the utmost seriousness and deliberation, by this construction had no other effect than to add three words to a conveyance. That cannot now be unsettled. But the question in the present case is, whether against plain sense we shall overturn all the cases that have been determined upon ejectments. And in my opinion there is a substantial difference between ejectments and real actions; the reasoning on one is not applicable to the other. The actions are *diverso intuitu*; and are not brought for the same purposes or for the same interests. And therefore it is true that a party may be entitled to recover in ejectment, who is not entitled to recover in a real action. A real action can only be brought for the freehold; whereas an ejectment may be brought for a term of years, for which a real action will not lie. An ejectment is a fictitious remedy; and it has always been so modelled as may be best adapted to the administration of justice, and to ease parties in the recovery of their rights. It has been extended to the cases I have mentioned, and to cases similar to the present, where, though there has been an outstanding term, yet, the plaintiff undertaking not to disturb the incumbrances, the defendant has not been permitted to set it up against him. Therefore I am of opinion that judgment should be entered on the second count in the declaration.

GROSE, J.—I am clearly of opinion with my brothers on the first question, that there must be judgment for the plaintiff; and it is unnecessary to go into a repetition of the reasons which they have given. With respect to the second, I agree with my Lord Chief Justice and my brother *Ashburst*. I am very well aware that some bad consequences may follow from recognizing in a court of law the doctrine which we are now considering: but the legislature must interfere and remedy that. We are sitting in a court of law, and are bound to give a legal decision. The owner of the estate raised a term for 99 years, and said that, for particular purposes, the trustees should have the possession of the estate. Then if the trustees are in possession, no person can turn them out of possession till the purposes



purposes of the trust are answered. The purpose of raising the term was, that the trustees should have it in their power to raise the annuities. Then suppose them out of possession, the trustees may say it was the will of the donor that they should have the possession for those purposes. To determine therefore that, if in possession, they shall not retain it, or shall not recover it if out of possession, would be counteracting the will of the person creating the term, and would be taking the estate out of the possession of trustees and putting it into the hands of persons different from those he intended. It is true that the purposes for which such a term is created may be trifling, when compared with the rest of the estate; but we cannot take that into consideration. Therefore on the broad ground, that we have no right to change the possession, and take it from him for whom the owner intended it, I am of opinion that the judgment is to be entered for the plaintiff on the third count only.

Judgment for the plaintiff on the third count.

TOWNLEY *against* GIBSON and Others.

Tuesday,  
Nov. 18th.

THIS cause was tried at the last *Lancaster* assizes before *Thomson*, Baron; when the jury found a verdict for the plaintiff, subject to the opinion of this court on the following case. The plaintiff at the time of the trespass was in the possession of the closes in which and under which the mines in question are; which closes were formerly part of the waste lands of the manor of *Yealand*, in the county of *Lancaster*, and were allotted to the plaintiff's ancestor *George Townley* by the award made under an act of the 17 Geo. 3. c. 79. for inclosing the waste lands; and Mrs. *Sarah Gibson*, under whom the defendant derives title, was at the time of passing that act seized in her demesne as of fee of the said manor of *Yealand*, and of all the waste lands lying within the manor, subject to certain rights of common. Many tenements within the manor were formerly enfranchised by *Robert Gibson* deceased, but there are nine customary tenements still remaining unenfranchised, lying dispersedly in different parts of the manor, and containing in

Where by the terms of an inclosure act, for inclosing the wastes of a manor, a certain portion was to be made to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, &c. a saving clause reserving to the lord all seignories

incident to the manor, and all rents, fines, services, &c. and all other royalties and jurisdictions whatever, will not reserve mines under those allotments to the tenants, though it was a subsisting lease of such mines, at the time the act passed, granted by the lord of the manor.

manerial jurisdiction appear there

the



1788.

TOWNLEY  
against  
GIBSON.

the whole about three or four acres of land. The case then set out several leases reserving rent, made by former lords, of the wastes, and the mines and the minerals thereunder; the last of these by which the mines only were demised was granted on 28th Feb. 1757, to hold from the 25th of the ensuing *March* for 21 years. Upon the granting of the last mentioned lease to one *Tiffington*, the mines were worked and continued to be so till some time in the year 1759; but from that period the lessee discontinued the works. In the year 1777 an act of parliament, intituled "An act for dividing and inclosing the common and  
 " waste grounds, and certain common fields, and also two  
 " mosses called *Waitbam-moss*, and *Hilderstone-moss*, within  
 " the manor of *Yealands*, in the parish of *Warton*, and county  
 " palatine of *Lancaster*," was obtained for enclosing the waste lands &c. within the said manor of *Yealands*, upon the terms and under the provisions therein set forth; which act amongst other things contains the following clauses, viz. "That the  
 " commissioners shall set out, allot, and assign unto the said *Sarah Gibson* 20 statute acres of the said common and waste grounds  
 " in lieu of and as a compensation for her right and interest in and  
 " to the soil of the residue of the said common and waste grounds respectively. And then the said commissioners shall allot and  
 " assign the residue of the said common and waste grounds unto, for, and amongst, the said *Sarah Gibson*, for and on account of her messuages, tenements, lands, and hereditaments,  
 " within the said manor, in respect whereof she is entitled to  
 " right of common upon the same common and waste grounds,  
 " and the said *George Townley*, *George Gray*, and the several other  
 " persons, and bodies politic and corporate, having right of  
 " common or other right, interest, property, or privilege, thereon, and to their heirs, assigns, and successors, respectively for  
 " ever, according and in proportion to their several and respective rights, &c. A subsequent clause directed that all and  
 " every the allotments &c. to be made under the act, should  
 " be vested in *fee-simple* in the several and respective persons,  
 " &c. to whom the same should be set out or allotted, and  
 " their heirs, assigns, and successors, respectively for ever, absolutely freed and discharged of and from all customary tenures, rents, fines, boons, and services, whatsoever; and that  
 " the several shares or allotments, so to be set out as aforesaid,  
 " should be in lieu of and in full compensation and satisfaction  
 " for,



1788.

TOWNLEY  
against  
GIBSON.

“ for all rights of common, and other former property, pri-  
 “ vilege, right, &c. and that all right of common, together  
 “ with all other former rights, interests, profits, &c. in and  
 “ upon the same, should from and immediately after that time  
 “ cease, and be for ever barred and extinguished; provided al-  
 “ ways, and it was further enacted, that *nothing in that act con-*  
 “ *tained should extend to prejudice, lessen, or defeat, the right,*  
 “ *title, or interest, of the said lady of the said manor, her heirs*  
 “ *or assigns, of in or to the seigniories incident or belonging to the*  
 “ *said manor; but that she and they and every of them should*  
 “ *and might at all times thereafter hold and enjoy all rents,*  
 “ *finer, services, courts, perquisites, and profits of courts,*  
 “ *goods, and chattels, of felons and fugitives, felons of them-*  
 “ *selves and put in exigent, deodands, waifs, estrays, for-*  
 “ *feitures, and all other royalties and manerial jurisdictions what-*  
 “ *soever, in and upon the said common and waste grounds,*  
 “ *thereby intended to be inclosed as aforesaid, to the said ma-*  
 “ *nor, or the lord or the lady thereof for the time being, in-*  
 “ *cident, appendant, belonging, or appertaining, in the same*  
 “ *and as full, ample, and beneficial, manner to all intents and*  
 “ *purposes, as she or they might or could have held and enjoyed*  
 “ *the same, in case this act had not been made.*” At the time  
 of passing the act the term in *Tiffington's* lease was unexpired.  
 Allotments were also made to the said *Sarah Gibson* in pursu-  
 ance of the said act.

*Ainsley* for the plaintiff. The question is, whether the lord  
 of the manor is entitled to the mines under the clause of reser-  
 vation in the act allotting the inclosures to the several tenants of  
 the manor. That part of the case which sets out the leases only  
 goes to prove that the defendant's ancestors were lords of the  
 manor, and that they were entitled to the soil in the wastes *before*  
 the passing of the act. But by the first clause it appears that  
 the commissioners were to set out 16 acres to the lady of the  
 manor, *in lieu of and as a compensation for her right and interest in*  
*the soil of the residue of the waste grounds:* and on the other hand,  
 all the allotments to the several tenants are to be *in fee*; which  
 the act declares shall be a full compensation *for all rights of com-*  
*mon, and other former property, privilege, right, title, interest,*  
*claim, and demand, whatsoever.* If the act had stopped here,  
 there could have been no doubt but that the lady of the manor  
 would have had no right whatever to the mines in these allot-



1788.

TOWNLEY  
against  
GIBSON.

ments: but if the clause of reservation entitled her to them; and a right still remained in her of digging in those inclosures without making any allowance for the injury sustained by the owner of the soil, all the purposes of the act would be defeated. It will be argued from this latter clause that the intention of the parties is apparent that the mines were to be reserved to the lady of the manor; but upon examination the operation of that clause will be found to be very different, for it only provides that she shall suffer no prejudice as to her right to all *seigniories* incident to the manor, and that she shall still enjoy all *rents, fines, services, &c.* and *other royalties and manerial jurisdictions*, but there is nothing in that clause which has the least reference to the soil of the manor; and the particular enumeration of the several things intended is decisive that mines were not intended to be reserved, otherwise they would have been mentioned. The word *seigniories* in the former part of the clause is explained and defined by the words which follow, and can only mean things of the same nature as those mentioned.

*Topping, contra.* This being a private act, passed at the requisition of the parties concerned, is to be construed like all other private agreements; and consequently the Court will consider the probable intention of the parties, to be collected from the situation and state of their several rights at the time the act passed. The ancestor of the defendant was the lady of the manor in which these copyhold tenements are, and therefore, as such, she would have been entitled not only to the mines under the wastes, but also under the copyhold inclosures, unless there had been some custom to exclude her. The right in these mines too existed in the lady separate from the interest in the soil, as appears from the leases of the mines stated in the case; which shew that the right of digging for mines was in fact exercised by the lords of the manor from 1714 to 1757, and during the continuance of the latter of these leases the act in question passed. He admitted that the words in the first clause were large enough to comprehend *mines*, if such had been the intention of the parties; but that could not have been so intended, for then the subsisting lease would have been affected, and the rents thereby reserved, which certainly could not have been intended, inasmuch as they are reserved expressly by the word *rents* in the saving clause; there being no other rents stated in the case to which



which that word can relate. In *Kaye v. Laxon* and others (a), a bequest of leasehold ground rents was held to pass the ground itself out of which the rents issued. So here, there being a reservation of rents to the lord, the right to the mines themselves out of which the rents issued will be also reserved to him. Besides there are other words in the saving clause which are sufficiently comprehensive to reserve this right of digging for mines, such as *seigniories* and *royalties*: if therefore the mines had been intended to be taken out of the lord, there should have been express words for that purpose.

*Ainsley* in reply was stopped by the Court.

Lord KENYON, Ch. J.—I agree that private acts of parliament are to be construed according to the intention of the parties, but then that intention must be collected from the words used by the legislature, without doing violence to their natural meaning. The defendant's counsel has supposed that mines are a distinct right from the right to the soil: but I do not think so, where they are under the land of the lord of the manor. In cases of copyholds a lord may have a right under the soil of the copyholder; but where the soil is in the lord, all is resolvable into the ownership of the soil; and a grant of the soil will pass every thing under it. The only word, in the saving clause, which affords any ground for argument, is the word "rents;" but when we see how that word is used with the others in that part of the act, it cannot be taken to include mines. At the time of passing this act of parliament, the mines under the waste ground were in the lady of the manor as part of the demesnes; she intended to give up several rights to the tenants, for which she has reserved a satisfaction. Then how do the tenants hold their allotments under the act? They could not take as copyholders, unless the act of parliament had so directed: but they take their allotments as freehold estates of inheritance. It is extremely clear that no new tenure can be created, unless by the authority of parliament, since the statute of *quia emptores* (b), nor can any person reserve to himself a right of escheat. Then it was urged by the defendant's counsel that the act of parliament could not affect the lease which was in existence when it passed: it certainly would not; neither would it have been affected if the lady had sold her estate in the manor, but the alienee would have become the landlord, and entitled to

(a) 1 Bro. Ch. Cas. 76.

(b) 18 Ed. 1. c. 1.



1788.

TOWNLEY  
against  
GIBSON.

the beneficial interest reserved by the lease; so here the lease will remain valid, but the right to the rents of the mines will pass to the person in whose favor the allotment was made under the act. For we cannot narrow the words of this act, and that transfers all the right in the soil to the several tenants. There is no doubt but that the mines might have been reserved: if it had been so intended, it would have been by express words; but there is no such reservation here. The word "rents" is explained by the other words used; but those rights which are reserved are mere badges of royalty, incorporeal rights, and other fruits of tenure of the like sort.

ASHHURST, J.—It does not appear to me that mines were intended to be reserved to the lady of the manor. The object of an inclosure is, that the lord of the manor in respect of his seignior and waste should have some part of the ground to be allotted to himself in lieu of his manerial rights; and the other lands are allotted to the proprietors of the enclosed lands within the manor; and these are not made copyholds, but the grantees take them as freeholds of inheritance. Therefore *prima facie* they are entitled to all mines, &c. belonging to the land. Then what is there in this case to take them out of the grantees, and vest them in the lord. The saving clause only amounts to what perhaps the law would otherwise have reserved without such a clause; for as the rights reserved are of an incorporeal nature, they would still have remained in the lady, because there is nothing in the act to divest her; but they have nothing to do with the soil or freehold, in which mines are included.

BULLER, J.—The general object of this inclosure act was to extinguish all the antecedent rights of the several parties interested, and to create others in lieu of them; in doing which it was thought right to make particular exceptions. Now when the legislature have made some exceptions, we cannot imply others which they have not made. As to the lease which did not expire till a year after the act passed, it probably was not thought of by either party at the time; the mines had not been worked since the year 1759; it was perhaps therefore abandoned, and not thought to be of any value for the short remainder of the term. However, the Court cannot carry the exception beyond the words of the act, and all the reservations are of incorporeal rights. By the general words the soil passed by the allotments to the several proprietors, and mines are considered



IN THE TWENTY-NINTH YEAR OF GEORGE III.

as part of the soil. I do not agree with the defendant's counsel that the lord may, unless restrained by custom, dig for mines on the copyholder's lands: But it is not necessary to consider that question here.

GROSE, J.—It is extremely dangerous to construe either deeds or acts of parliament according to supposition. The question here is, whether, under this act of parliament, the mines passed to the tenants? The soil undoubtedly passed; now what are the mines but part of the soil. And every thing which was intended to be reserved to the lady of the manor is expressed; and all those rights are incorporeal hereditaments, and not like mines. Then, not only the general words, under which the allotments were made, are large enough to carry mines, but the subsequent exception is not broad enough to save them. At the same time it is rather extraordinary, that so valuable a part of the property as mines should not have been expressly reserved to the lady of the manor, if it had been so intended.

Postea to the plaintiff.

G O F F *qui tam* against P O P P L E W E L L and  
Another.

Tuesday,  
Nov. 18th.

MARRYAT obtained a rule to shew cause why the declaration in this action (which was for usury) should not be amended in the dates and sums. This motion was made on the authority of *Bonfield qui tam v. Miller (a)*, where Lord Mansfield said "whilst all is in paper, you may amend": and Denison J. added "there is no difference between *civil* and *penal* actions, where they apply as for an amendment at common law, and all is in paper." Now in this case all is yet in paper; and the objection to this rule cannot be so strong as that in the case in *Burrow*, where the Court permitted the amendment notwithstanding issue was joined. And unless the Court will grant this application, the party will be without remedy, inasmuch as the action was commenced four years ago, and if he is obliged to commence another, the defendants will plead the statute of limitations.

Where a *qui tam* action for usury had been depending four years, the court would not allow amendments to be made in the declaration, tho' the pleadings were still in paper.

(a) 2 Burr. 1093.



1788.

GORF  
against  
POPPLE-  
WELL.

*Erskine*, against the rule, admitted the power of the Court to comply with the present application, but observed that the circumstance of four years having elapsed since the commencement of this action ought to weigh in their discretion in permitting the amendment in this case.

*The Court* (a) said that though there was no difference between civil and penal actions, as to amendments at common law, whilst all was in paper, yet, as this action had been hanging over the defendants' head for four years, they would not in their discretion permit the proposed amendments to be made, which would in effect amount to a permission to bring another action, to which otherwise the defendants might plead the statute of limitations. And therefore they

Discharged the rule.

(a) Abf. Lord Kenyon.

Tuesday,  
Nov. 18th.

Y E A, Baronet, against F I E L D.

Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and the deeds afterwards come into the vendee's possession on his taking a mortgage of the other part of the estate, and he then assigns the mortgage to a third person not mentioning the deeds, such third person cannot maintain trover against him for the deeds.

**T**HIS was an action of *trover* for title deeds. The defendant had purchased a parcel of the estate; but the rest being in mortgage, no title deeds were delivered, and he took a covenant from the vendor to produce them at any time or on any trial, &c. on the request of *Field*, whenever they came to his hands. Afterwards he took an assignment of the mortgaged premises on an advance of the money, and had all the deeds delivered to him with the assignment. He afterwards assigned the same mortgage to the plaintiff, who advanced the money on it; and the title deeds remaining with the defendant who refused to deliver them up, this action was brought to recover them. At the trial at the last assizes at *Wells*, *Buller*, J. nonsuited the plaintiff; to set aside which nonsuit a motion had been made on a former day (a); but it stood over for an enquiry to be made whether any mention was made of the deeds in the assignment from the defendant to the plaintiff.

*Gibbs* now renewed his motion, and contended that though no mention was made of the deeds in the assignment, yet as they came into the defendant's possession not as vendee of the other premises but as assignee of the mortgage, and as he

(a) Saturday Nov. 8th.

had



IN THE TWENTY-NINTH YEAR OF GEORGE III.

had assigned the mortgage to the plaintiff, he should have delivered over the deeds. And he compared this to the case of a feoffment with a general warranty of the title, where the feoffee is not entitled to the possession of the deeds. Lord *Buckburs'* case 1 *Rep.* 1. Here the defendant relied on the covenant of the vendor to produce the deeds whenever it should be necessary, and it was not intended that he should have the possession of them.

Lord KENYON Ch. J.—Although at the time of the purchase, the defendant had no right to the possession of the deeds, yet since that time they have by accident come into his possession; and the plaintiff cannot recover them from him. To entitle the plaintiff to recover, he should have a better right to the deeds than the defendant: but in the assignment to him, there is no grant of them. In old conveyances there is a reservation made of such deeds as tend to deraign the warranty paramount.

*Per Curiam,*

Rule refused.

The KING *against* the Inhabitants of FILLONGLEY.

TWO Justices, by an order, removed *John Glover*, his wife, and their six children, from *Fillongley* to *Kinwalsley*, both in the county of *Warwick*. On appeal, the sessions quashed the order, and stated the following case.

The pauper *John Glover* on the 1st *January* 1786, and for some years before, rented, and resided on, a tenement in the parish of *Fillongley*, of the yearly value of 10*l.* and upwards, and continued thereon until the 29th *April* in the same year, when he was removed by an order of removal from the parish of *Fillongley* to the hamlet of *Kinwalsley*: and on the same day on which he was delivered with the said order of removal, he returned back to the tenement in the parish of *Fillongley*, where he resided without making any new contract with his landlord for the same, and without any interruption for about three quarters of a year, and then was removed by the present order to the said hamlet of *Kinwalsley*. An appeal against the said order of removal of the 29th *April* 1786 was entered, but was not prosecuted.



1788.

The KING  
against  
The Inhabi-  
tants of  
FILLONG-  
LEY.

*Dayrell* in support of the order of sessions was stopped by the court.

*Bearcroft* and *Willis contra*. The order of removal of the 29th of *April*, as the appeal was not prosecuted, was conclusive to all the world that the pauper was not then settled in the parish of *Fillongley*. Then the question is, whether he did any act subsequent to that day to gain a settlement in *Fillongley*? It appears that he returned there on the very day of the order of removal; and then he was in *statu quo*. But this return was an offence against the poor laws; for which he was punishable by the 13 & 14 *Car. 2. c. 12.* and 17 *Geo. 2. c. 5.* as a vagrant. And though he remained there three quarters of a year afterwards, yet as it is stated that he entered into no new contract on his return, he cannot be considered as "coming to settle on a tenement of 10 *l. per annum* within the statute." They admitted that under the determinations on this subject no lease was necessary, but there should be some contract or other. But here no new contract can be inferred after the pauper's return, because it is negatived by the case. And the former contract was entirely done away by the order of removal. In the *King* and *St. Michael's, Bath* (a) it was held that no settlement was gained by the pauper's being barely in possession of a tenement of 10 *l. per annum*, but that there should be a privity of contract. The pauper's remaining in the parish was a mere continuation of an unlawful act; and it is a clear principle that a right cannot be derived out of a wrong. In order to support the settlement in *Fillongley*, the Court must virtually reverse the first order of removal. But the Court must now presume that the first taking was fraudulent, otherwise a settlement would have been gained. And even though that removal was wrong, that question cannot be entered into now. The case of the *King v. Kenilworth* (b) is like the present. That indeed was a case of hiring and service; but the principle is the same; for there no settlement was gained, because that could not have been done without having recourse to the contract and service before the order. In that case *Buller, J.* said the pauper was indictable for returning to the parish in defiance of the order; and that the order of removal put an end to the contract between the master and servant. So here the contract was dissolved by the first removal, and no new contract was made.

(a) *Cald. 110.*(b) *Ante 598.*



LORD KENYON, Ch. J.—This case is abundantly too clear to raise any serious doubt. Nothing can be better established than that the order of removal unappealed from is conclusive as to the pauper's settlement at that time: but there is nothing in the order which prevents the pauper's return, provided he does not return in a state of vagrancy. It is also clear that it is not in the power either of the two magistrates who remove the pauper, or of the justices at their sessions on an appeal, to put an end to a contract between the parties respecting the taking of a tenement. As far as respects the settlement of the person removed, they may determine, but no farther. And that distinguishes this case from the *King* and *Kenilworth*: that was a case of master and servant, and there the justices have a power of putting an end to the contract. But here, at the time of the first removal the justices had no right to put an end to the contract, nor can we see on what ground the pauper was removed; for it is stated that he *rented and resided on a tenement of 10l. per annum*, which infers a contract. That contract was most clearly not dissolved by the adjudication of the justices; and then the pauper cannot be considered as returning in a state of vagrancy. And though he did not return under a new contract, yet that was not necessary, for the old contract remained; and then by residing at *Fillongley* forty days after the removal, he gained a settlement. It has been said that the Court may presume fraud in the first taking: but there is no rule better established than that fraud is never to be presumed: and I believe in a case sent for the opinion of this Court which was pregnant with fraud, they would not presume fraud, because it was not stated.

ASHHURST, J.—The first order of removal could not possibly rescind the prior legal agreement between the pauper and a third person. And though an order is conclusive as to the settlement at the time when it is made, that is merely technical, and so far we are bound; therefore in this case it must be taken that the pauper had not gained a settlement in *Fillongley* at the time of the first removal. But when he returned, it was under the old contract which had never been rescinded. Then he did not return as a vagrant; but he came to the parish of *Fillongley* to settle on a tenement of 10l. per annum, and he there acquired a settlement by a residence for more than forty days. It is not necessary to determine here

1788.

The KING  
against  
The Inhabitants of  
FILLONGLEY.



1788.

The KING  
against  
The Inhabi-  
tants of  
FILLONG-  
LEY.

what would have been the effect of his residing in *Fillongley* for a shorter space of time than forty days after the first order of removal. The case cited from *Caldecott* does not apply to the present; for it is there stated that the pauper resided on the premises against the consent of the landlord; but in this case the pauper resided under a contract.

GROSE, J. (a) This case is distinguishable from that of *The King* and *Kenilworth* for the reasons given. I think, if we could proceed on supposition, that the real transaction was this; after the appeal against the first order was made, the justices discovered that he was wrongfully removed, and then they agreed that he should be at liberty to return to *Fillongley* on his dropping the appeal. However we are to determine on the facts stated. And for the reasons given, I am of opinion that the contract was not dissolved by the first order; that the pauper had a right to return to the parish of *Fillongley*; and by residing there more than forty days he gained a settlement in *Fillongley*.

Rule for quashing the order of Sessions discharged.

(a) Abf. Buller, J.

Wednesday,  
Nov. 19th.

PESHALL, Bart. against LAYTON.

The Same against MARTIN.

The sheriff and the bailiff are not both answerable in an action for a penalty under 32 G. 2. c. 28. for the same act. And actions having been brought against both, and a verdict obtained in each, the court stayed the proceedings on payment of one penalty and the costs in one action.

THE plaintiff (a) having recovered a penalty of 50 l. against each of these defendants,

*Bower* had obtained a rule to shew cause why, on payment of one penalty and the costs in both actions to be taxed by the Master, all further proceedings should not be stayed.

*Lane* now shewed cause, observing that if the Court should be of opinion that the plaintiff was not entitled to recover against both these defendants, he would not drive him to an *audita querela*. But he contended that under the words of the 32 Geo. 2. c. 28. s. 1. both the sheriff and the bailiff were liable. The first section of that statute enacts "that no sheriff, under-sheriff, or bailiff," shall carry the party arrested to prison within twenty-four hours; and the 12th section declares that every sheriff, under-sheriff, bailiff, &c. shall forfeit 50 l. for every such offence. In the case of *Woodgate* and *Knatchbull* (b), the Court held that the sheriff was liable *civiliter* for the acts of his

(a) Ante 512.

(b) Ante 148.

bailiffs;



## IN THE TWENTY-NINTH YEAR OF GEORGE III.

bailiffs; and there can be no doubt but that the bailiff himself, who actually made the arrest, is also liable. Besides there may be good reason and policy in making the sheriff answerable in this case as well as the bailiff, because he ought to superintend the conduct of his officers. And when this case was before the Court in last *Easter Term*, they seemed to intimate that the plaintiff might recover against both the defendants.

*Bower* in support of the rule was stopped by the Court.

LORD KENYON, Ch. J.—This seems to be an extremely clear case on the words of the act of parliament. In this case the sheriff himself did nothing: I admit that, under the rule of *respondet superior*, the sheriff is liable for the acts of his officers; but it shall not be permitted to the party to say that the bailiff hath offended in his own person, and the sheriff by the bailiff as his representative: The words of the act are to be taken *reddendo singula singulis*. So, by analogy, in the game laws where several persons offend by going out and killing a hare, it has been determined that only one penalty can be recovered, though the plaintiff has his election to sue either.

ASHHURST, J.—The reason of enumerating all the officers in the act of parliament was that the plaintiff might have his option to proceed either on the law, or on the fact, of the case. If the former, the sheriff is liable for every act done by the subordinate officers: but if he proceed according to the truth of the case, then the bailiff, who did the act, is personally answerable. But he cannot proceed against both for the same act.

GROSE, J. (a) If this were not the construction of the act, the very same person must pay the penalty twice; for as the bailiff gives a bond of indemnity to the sheriff, he would pay the penalty in each action.

Rule absolute to stay the proceedings, on payment of one penalty and the costs in one action.

(a) *Abf. Buller, J.*

## ROGERS against STEPHENS.

**U**PON a motion for a new trial in this case, which had been tried before Lord Kenyon, at the Sittings after last term at

acceptance of a bill of exchange from the holder to the drawer is done away by shewing that the latter had no effects in the hands of the drawee at the time.—Qu. How far this rule holds if the drawer shew from other circumstances that in fact he sustained an injury for want of such notice? But at any rate if on demand made he answer that the bill must be paid, he shall be liable. Where a foreign bill of exchange payable 40 days after sight is refused acceptance, and an action is brought in order to charge the drawer, proof of the noting of the bill alone for non-acceptance is not sufficient, without proving that it was also protested for non-acceptance, though there be a subsequent protest for non-payment.



1788.

ROGERS  
against  
STEPHENS.

*Guildhall*, his Lordship reported, that this was an action by the plaintiff, as payee of a bill of exchange, at forty days after sight for 87*l.* value received for the use of Mr. *William Calvert*, *Liverpool*; drawn by the defendant from *Newfoundland* on the 1st *October* 1785, on Mess<sup>rs</sup> *Berbeck* and *Blake*, in *London*, who on its being presented for acceptance on the 1st *November* refused to accept it; in consequence of which it was first noted for non-acceptance, and afterwards protested for non-payment. The defence set up was, want of a protest for non-acceptance (a), and notice to the drawer, which was rebutted by shewing that he had no effects in the hands of the drawees either then or afterwards. Upon which facts his Lordship stated that he had been of opinion that the objection, arising from want of notice to the drawer, had been done away by shewing that he had had no effects in the hands of the drawees, and that therefore a protest for non-acceptance was unnecessary in this case. And that there appeared further to have been a subsequent promise made by the defendant to the plaintiff to pay this bill; for at a meeting between the plaintiff's agent and the defendant at *Chester*, upon the former's representing to him that the bill had been dishonoured, and pressing him for payment, he said "it must be paid." His Lordship therefore directed the jury to find a verdict for the plaintiff, which they did.

In addition to the above facts, *Bower*, in moving for a new trial, and afterwards on the rule to shew cause, stated that he had evidence ready at the trial to have produced, if it would have been of any avail, which would have shewn that the defendant really had been injured by want of notice in this case; according to which the real transaction stood thus; the defendant and one *Calvert* had had dealings together previous to the departure of the former to *Newfoundland*, and he had a right to draw upon *Calvert* at the time the bill was drawn, having advanced money on his account to that amount. In this situation *Calvert* had directed the defendant to draw upon *Birbeck* and *Blake* as his agents, instead of drawing upon him. The

(a) Vide *Goofrey v. Mead*, *Westminster* 1751. *Bull. N. P.* 271. The protest was not set out in the declaration in the present case, which *Bower* at the trial pressed as a ground for a nonsuit; because if the objection were not taken in that stage, the defendant

could make no advantage of it in arrest of judgment; upon the authority of *Salomons v. Stawley*, *B. R. M.* 24 *G.* 3. *Dougl.* 659. n. *Ld. Kenyon* admitted the objection; but on the other circumstances thought it unnecessary in this instance.

defendant



defendant accordingly drew the bill *bonâ fide*, upon a supposition that *Calvert* had effects in their hands to answer it. It turned out indeed that he had none, but that was not known to the defendant; who, when he returned to *England*, relying upon those bills having been duly honoured, he not having had notice to the contrary, had settled his accounts with *Calvert*, who was since insolvent, and had delivered up to him goods and effects which he held in his hands of greater value than the amount of the bill. The reason assigned for the non-production of this evidence was that it had been understood at the trial that his Lordship had delivered his opinion upon an admission of these facts; but Lord *Kenyon* said that he had no note or recollection of this evidence having been tendered.

*Erskine* and *S. Heywood* shewed cause against the rule. The objection which was taken to the want of a protest for non-acceptance in this case, even admitting it to hold, was entirely done away by the proof which the plaintiff gave of the drawees having no effect of the drawer in their hands to answer the bill. His Lordship was decidedly of that opinion at the trial on the facts which were given in evidence. The principle on which that opinion was founded is explicitly established in the case of *Bickerdike* and *Bollman* (a), and recognized in *Goodall* and *Dolley* (b); and it is too clear to be now disputed. But those determinations were ingeniously attempted to be distinguished from this case, by saying that the Court there proceeded on the presumption of fraud in the drawer; and it is argued from the additional evidence, brought forward in support of the rule for a new trial, that the circumstances which induced the defendant to draw this bill sufficiently exclude such a presumption. Perhaps it would be sufficient to say in answer that nothing of that sort appears from the report which have been made: but even admitting the full force of such evidence, it could not vary this case; for as between these parties it is not necessary for the holder of a bill to look to any other persons than those who are liable upon the face of the bill itself. He cannot enter into the particular grounds which induce the drawer to draw the bill, or the drawee to refuse his acceptance; it would lead to endless uncertainty if it were otherwise. If one man choose to draw a bill, having no funds of his own in the hands of the drawee,

1788.

ROGERS  
against  
STEPHENS.

(a) Ante 1 vol. 405.

(b) 1 vol. 714. and also in a case of

*Portis v. Petre* and Others, Executors of  
*Keble*, H. 28 G. 3. B. R.



1788.

ROGERS  
 against  
 STEPHENS.

but relying upon the casualty of another's stock who has misled him, he has his remedy over against that person; but that makes no alteration in the law relative to the holder of such a bill. The rule of law is clear, and operates with a double aspect in this case; for supposing the plaintiff was bound to take notice that this was in truth the bill of *Calvert*, and not of the defendant *Stephens*, which it purports to be, still the rule would apply against the latter, for it appears that *Calvert* himself had no effects in the hands of the drawees. Again too, this evidence could have no operation; for admitting that the defendant was entitled to notice of the bill's being dishonoured, it is in the power of any party to wave an advantage which the law gives him; and that has effectually been done here by the subsequent promise to pay the bill made by the defendant to the plaintiff's agent; which amounts to a full admission in law of that debt, which he was before bound in conscience to discharge.

*Bower and Walton*, in support of the rule, rested their argument altogether upon those facts, the admission of which they had taken for granted at the trial was fully understood. Reasoning from these, they contended that the principle upon which the case of *Bickerdike and Ballman*, and the other cases were determined against the drawers of those bills, to whom notice of non-acceptance had been held not necessary to be given, was decisive that it ought to have been given in this case; for besides the presumption of fraud against a man who draws a bill upon another, knowing that that other has no effects in his hands to answer it, one of the principal grounds assigned by the Court for their opinion in those cases was, that no injury could arise to the drawer for want of notice, where the drawees had no property of his in their hands, which he might withdraw on their refusal to accept his bill. That reason therefore does by no means apply to a case like the present where the drawer acted *bonâ fide*, and has actually sustained an injury from want of due notice. Besides those cases were exceptions to the general rule. Nothing can be clearer than that *primâ facie* the holder of a bill of exchange, whereof acceptance is refused, is bound to give notice thereof to the drawer; if then he takes upon himself to withhold it from any collateral circumstances, he acts at his peril. If it appear that the drawer could receive no injury from the want of it, he is indemnified by the event; but still there is laches in him, which that fact alone



alone can justify. The very form in which this bill was drawn was sufficient notice to the holder that it was to be paid out of *Calvert's* effects; for it is said to be for his use. So that there was more reason than ordinary to imagine that want of notice might be prejudicial to the defendant. Considering the question even in a general point of view it would be highly detrimental to commerce, if it were to be laid down as a general rule, without exception, that the objection arising from want of notice in these cases might be done away by shewing that the drawee had no effects of the drawer in his hands at the time. Nothing is more common than for merchants abroad, who are about to ship goods to their consignees or factors in *England*, to draw bills of exchange on them before the goods come into their hands; in which cases the most material injury might arise to those traders from want of notice that the bills had not been accepted, since they might be deprived by that mean of the opportunity of stopping their goods *in transitu*. Now here the defendant has actually sustained a damage by the laches of the plaintiff, as he was induced to part with effects belonging to *Calvert* in his hands, on the supposition that his demand upon him was satisfied by means of this bill. If under these circumstances the plaintiff were not justified in neglecting to give notice, then he ought to have been non-suited for want of a protest for non-acceptance. *Goostrey v. Mead*, *Bul. N. P.* 271. 2 *Ld. Raym.* 993. *Borough v. Perkins*, 1 *Salk.* 131. As to the conversation which passed at *Chester*, it by no means amounts to a promise that he, the defendant, would pay the bill; it rather applies to *Calvert's* paying it: but if it were only doubtful, the Court under the circumstances of neglect on the part of the plaintiff, or even of ignorance on the part of the defendant, would not permit the latter to be bound by it. In the case of *Blesard v. Hirst* (a), where an indorser of a bill of exchange had been once discharged by the laches of the indorsee in not giving due notice of non-acceptance, the Court held that the indorser did not wave the advantage which the law and common justice had entitled him to by his making a subsequent promise to pay the bill, being ignorant at the time that he was no longer bound to pay the same.

Lord KENTON, Ch. J.—In general it is true that in the case of foreign bills of exchange a protest for non-acceptance is

(a) 5 *Burr.* 2670.

necessary,

1788.

ROGERS  
against  
STEPHENS.



1788.

ROGERS  
against  
STEPHENS.

necessary; and it is also true that, generally speaking, notice of non-payment should be given to the drawer in order that he may withdraw his effects out of the hands of the drawee: but it has been long established that the want of effects in the hands of the person on whom the bill is drawn discharges the holder of the bill from the common formalities; because the drawer must know that he had no right to draw on the drawee. To be sure it would not be a sufficient excuse for the drawee to say that he had no effects belonging to the drawer in his hands, but in this case it was proved that in point of fact he had none. Then this does not differ from the ordinary case. But it is now urged at the bar, that the defendant offered evidence to prove that he actually sustained an injury in consequence of not receiving notice of the non-payment of the bill: but as far as my memory goes, no evidence was refused which was offered at the trial: and it would be extremely dangerous to grant a new trial on a suggestion that the party will make out a better case on a second trial. But even admitting for a moment the additional facts which have been brought forward, no answer can be given to that part of the case relative to the subsequent promise. For when he was informed at *Chester* by the plaintiff's agent that the bill had not been paid, he said, "it must be paid:" now this appears to me to be an admission that the holder had a right to resort to him on the bill.

ASHHURST, J.—On the facts appearing on the report, I am clearly of opinion that the verdict is right. It does not appear from thence that any evidence was offered to prove the transaction between the defendant and *Calvert*. But even admitting that such proof had been given, yet I do not think it clear that that transaction would have taken this case out of the common rule. For the law being now established that notice of non-acceptance of a bill of exchange to the drawer is not necessary, where the drawee has no effects belonging to the drawer in his hands, every person must be supposed to know the law. And when the plaintiff found that the drawees of this bill had none of the defendant's effects in their hands, he knew that he was not bound by law to give notice of the non-acceptance. He was not bound to take cognizance of any private transaction between the drawer and a third person which did not appear on the face of the bill. At all events the other ground affords a satisfactory answer to this application. The defendant's subsequent



IN THE TWENTY-NINTH YEAR OF GEORGE III.

719

quent acknowledgment, "that the bill must be paid," amounts in point of law to a promise that it shall be paid, and does away the necessity of considering the question relative to the want of notice. Therefore neither on the one ground or the other does there seem to be any reason for granting a new trial.

1788.

ROGERS  
against  
STEPHENS.

GROSE, J. (a) It appears on the facts of this case, as reported, that the drawees had no effects belonging to the defendant in their hands either at the time when the bill was drawn, or when it became payable. Then this case falls within that of *Bickerdike* and *Bollman*, which was well considered. But it has been endeavoured to take this case out of the rule there laid down, by saying that the defendant could have proved that he really sustained an injury in consequence of not receiving notice of the non-acceptance of the bill: but it does not appear upon the report that any such evidence was, or was offered to be given; therefore the facts fail him. The other ground is also decisive against granting a new trial: for the defendant's subsequent acknowledgment, "that the bill must be paid," is an admission by the drawer that he had no effects in the hands of the drawees, and that he sustained no damage for want of notice that the bill had not been paid.

Rule discharged.

(a) *Abf. Buller, J.*

SMITH against PAINTER.

Thursday,  
Nov. 13th.

THE writ in this case was issued the 29th of December last, returnable the first return of *Hilary* term; notice of declaration in chief was delivered on the 5th of May, (the last day of *Easter* term) as of *Easter* term; but common bail was not filed till the 3d of June, when the plaintiff filed it according to the statute, and then a rule to plead was also given; and on the 9th of June interlocutory judgment was signed. Notice of executing a writ of enquiry was dated on the 21st of June, but was not received by the defendant's agent until the 25th of June, on which day the defendant's attorney gave notice that he would move to set aside the interlocutory judgment for irregularity. Accordingly

The plaintiff cannot file common bail according to the statute after the succeeding term after the writ is returnable. Plaintiff may deliver a declaration against the defendant conditionally before the time for his appearing is past, and file common bail for him: but can declare.

*Lambe* obtained a rule on a former day (a) to that effect, on

after that time he must bring defendant into Court before he

(a) In this term.



720  
1788  
SMITH  
against  
PAINTER.

### CASES IN MICHAELMASTERM

two grounds; First, that common bail was not filed either in the term when the writ was returnable nor in the term following (a); Secondly, that common bail was not filed when the declaration was delivered in chief; and therefore the declaration must be considered as a nullity (b).

*Lane* now shewed cause. By the practice of this court, the plaintiff has a right to file common bail at any time before judgment signed, as of the proper term. And even if there were any irregularity with respect to the notice of declaration or to the time of delivering it, any application on that ground should have been made before the interlocutory judgment was signed. But

*Per Curiam*: (After referring to the Master,) The first is an incurable objection; and the defendant applied to set aside the proceedings as soon as he had any opportunity. And as to the second objection; the plaintiff may deliver a declaration conditionally before the time for the defendant's appearance is expired; but if he wait till after that time, he must bring the defendant into Court before he can declare at all.

Rule absolute.

(a) *Rep. Temp. Ld. Hardw.* 138.

(b) *Vid. Cook v. Raven*, 1 vol. 635.

### GOODTITLE on the Demise of PEAKE against PEGDEN.

If a term be bequeathed to A. and his lawful heirs, and if he die and leave no lawful heir then to B. the limitation to B. is good.

**EJECTMENT** for leasehold premises, tried at the last *Maidstone* assizes, when a verdict was found for the plaintiff, subject to the opinion of the Court on a case; stating,

That *Thomas Biley*, being possessed of the premises in question for a term of years, by will dated 30th August 1763, "gave them to his grandson *Thomas Biley Peake*, son of *Daniel* and *Sarah Peake*, and the heirs lawful of him for ever; but in case he should happen to die and leave no lawful heir, then and in that case he gave them, after the death of the said *Thomas Biley Peake*, to the next eldest son or heir of the said *Daniel Peake* and *Sarah* his wife; and so on to the next eldest son or heir, if the last should die without heirs." *Thomas Biley Peake*, the devisee, took possession of the leasehold estate in question under the will, and continued in possession till May 1784, when he died without issue; and the defendant claims under



under him. The lessor of the plaintiff claims the estate under the will of the testator, *Thomas Biley*, being the next eldest son of *Daniel* and *Sarah Peake* living at the time of the death of the said *Thomas Biley Peake*.

1788.

GOOD TITLE  
against  
PEODEN.

*Robinson* was to have argued for the plaintiff, and *Venner* for the defendant. But

Lord KENYON, Ch. J.—said that, on conference with the rest of the Court, they were clearly of opinion, on the authority of *Forth* and *Chapman* (a), before Lord Chancellor *Parker*, which had been uniformly followed by a series of cases down to the present time, that the limitation over, under which the plaintiff claims, is good. This is a chattel interest limited “to *T. B. Peake*, and the heirs lawful of him for ever; but in case he should happen to die and leave no lawful heir, then over, &c.” Now it is apparent on the will that the testator by “lawful heirs” meant “heirs of the body;” and “leaving no lawful heir,” must be confined to “leaving no issue at the time of his death.” This is conformable to all the rules of limitations; for a limitation over may take effect if the contingencies on which it depends must happen within a life or lives in being, and twenty-one years afterwards. In some of the cases it has been doubted, whether the particular words used confined it to dying without issue at the time of the death of the person to whom the bequest is made; but where they are so confined, as we think they are in the present case, it never was doubted but that the limitation over was good.

*Per Curiam.*

Postea to the plaintiff.

(a) 1 P. Wms. 663.

DOE on the Demise of MARY REBECCA MILBORNE  
against CHRISTOPHER MILBORNE.

Friday,  
Nov. 21st.

THIS was an ejectment on two several demises by the lessor of the plaintiff, the first laid on the 1st October 1781, and the second on the 4th April 1788, to recover several premises at *Eritb* in the county of *Huntingdon*. At the trial at the last *Huntingdon* assizes before *Hotham*, Baron, a verdict was

A power given to an executrix to raise a portion for a younger child does not extend to real estates, of

which she was also trustee. A power to raise portions may be executed at several times, provided the first execution be not meant as a complete execution, and that the party, in the whole execution, do not transgress the limits of the power.

found



1788.

DOE  
against  
MILBORNE.

found for the plaintiff, subject to the opinion of this Court on the following case.

*Clayton Milborne*, being seised in fee of the premises in question, by will duly executed dated 11th May 1723, devised to his wife *Rebecca* all his lands and tenements whatsoever in the counties of *Huntingdon* and *Cambridge* for life, remainder to the use of his eldest son *Clayton Milborne* in tail male, remainder to his youngest son *Christopher Milborne* in tail male, with remainder in fee to *Rebecca* his wife; and devised all his other real estate whatsoever to his wife, and her heirs, to the use of his eldest son *Clayton Milborne* in tail male, with remainder to his second son *Christopher Milborne* in tail male, remainder to his own heirs. The testator also gave to his wife 1500 *l.* in trust to pay the same to his youngest son at his age of 21 with interest, and in the mean time for his maintenance. And gave to his said wife another sum of 500 *l.* in trust, to apply the same for the benefit of his said children or either of them as she should think fit; and appointed his wife guardian of his children, and his sole executrix. On the 31st of *August* 1726 the testator *Milborne* made a codicil to his will, also duly executed to pass real estates, in the following words; "Having about four or five years since made my will, which by my codicil I do confirm in every part, and having made my dear wife executrix and residuary legatee, and since the making that will having a daughter born, I leave it in my executrix's power to give my daughter what proportion she shall think fit, leaving my dear wife *Rebecca Milborne* executrix to this codicil, as well as to my said will before mentioned." The lessor of the plaintiff was the daughter of the testator, born between the time of making the will and codicil. The testator died in *September* 1726, leaving *Clayton Milborne* his eldest son, and heir at law, and the defendant *Christopher Milborne*, and *Mary Rebecca Milborne*, spinster, the lessor of the plaintiff, his only younger children. And after his death *Rebecca Milborne*, his widow, duly proved the will and codicil. At the death of the testator his personal estate was not sufficient to pay his debts and legacies. The testator's eldest son, *Clayton Milborne*, died on the 3d *June*, 1743, intestate, and without issue. *Christopher Milborne* the defendant attained his age of 21 years in *July* 1736, and received from his mother for the principal and interest due on his legacy 2251 *l.* 16s. 9d. by different payments at different times. The case then stated that in 1749 the premises in question, together with



1788.

DOE  
against  
MILBORNE.

with others, were mortgaged by the defendant and his mother for 500 years, subject to the life estate of the widow, for securing a sum of money, which has since been paid, and the deed delivered up to the defendant without any assignment of the term. By indentures dated 31st July 1750, to which the widow, the defendant, and the lessor of the plaintiff, were parties, in consideration of natural love, and in order to make a provision for the lessor of the plaintiff pursuant to the intention of her father, it was covenanted that a fine should be levied for the purpose of conveying to trustees certain premises in the county of Cambridge, devised by the will of Clayton Milborne, for 500 years, upon trust, to raise and pay 1000 l. to the lessor of the plaintiff, on her marriage or at the death of her mother; which fine was accordingly levied. By lease and release of the 3d and 4th October 1769, between the widow and the lessor of the plaintiff, reciting the will and codicil, and the deed of 1750, and also reciting that the lessor of the plaintiff was still unmarried and wholly unprovided for, and that the widow was desirous of making a present provision for her out of her estate for life; and also reciting that the contingent interest to which she was entitled on her marriage, or her mother's death, was not adequate to her father's intention, or in proportion to her brother's fortune, the widow, in further performance of the power so given to her by the codicil, conveyed to the lessor of the plaintiff certain premises comprized in the deed and fine of 1750, for the mother's life, and certain other premises in Huntingdonshire, not comprized in that deed and fine to her in fee. By a decree in Chancery, made 27th June 1783, in a cause in which the lessor of the plaintiff was the plaintiff and the defendant and another executors of the trustee in the deed of 1750 were defendants, it was ordered that the sum of 1000 l. and interest, secured to the lessor of the plaintiff by the deed of 1750, should be raised and paid. The premises in Huntingdonshire, mentioned in the deed of 1769, are not comprized in the deed of 1750, and are of the annual value of 20 l. and for which this ejectment is brought. The estates in the counties of Cambridge and Huntingdon, devised by the will of Clayton Milborne, are of the clear annual value of 30 l. For four or five years preceding the death of the widow, the receiver of the whole estate in Huntingdonshire paid the lessor of the plaintiff the net rent of the premises in question by him received, by order of the widow, and took



1788.

DOE  
against  
MILBORNE.

receipts in the widow's name. The widow continued in the possession of the estates from the time of her husband's death until her decease, which happened on the 12th *January* 1781; and on her death the defendant entered on the estate in question.

*Wilson* for the plaintiff. The question arises on the extent of the power created by the codicil. First, The testator by his codicil gave his widow a power to make a provision for his daughter out of his real estate. It appears that the codicil was inaccurately drawn by the testator himself, without any legal assistance; and as it is to make a provision for a daughter then unprovided for, it is entitled to a favourable construction. No technical words are necessary in such an instrument; and it must be construed according to the intention of the testator. The word "power" shews that the provision was not to be made out of the estate devised to the wife, or the personal property given to her as executrix; for "power" means control over some other estate than her own. This power perhaps extends to both real and personal estate: However it is sufficient for the plaintiff's purpose, if it be not confined to the personal estate. The codicil begins by confirming the will in every respect; it could not therefore have been the testator's intention that the younger son's fortune should contribute to the provision of the daughter, but it was his intention that it should be made out of the eldest son's estate. Neither could it have been intended to make this provision out of the personal estate, for that was insufficient to pay his debts at the time of his death, between which time and the time of the codicil, which was soon afterwards, no material alteration in his property could have taken place. There are indeed other words which seem to confine this provision to the personalty, for it is left in the power of the *executrix* to make it. But here "executrix" is used in the popular, not the legal, sense; for by the will, after devising his estates in two counties, he devised all his other real estate to his wife, and her heirs, to the use of his eldest son, &c, and also made her sole executrix; so that she had the whole disposition of his property; and all benefit to the sons was to be derived through her. In *Hope dem. Brown v. Taylor* (a), the word "legacy," though confined in its legal sense to *personalty*, was held to extend to *real estates*, in order to give effect to the testator's intention. There is also another circumstance which shews the testator's intention to extend this power

(a) 1 Burr. 268.



1788.

DOE  
against  
MILBORNE.

to real estates; for the codicil is executed by three witnesses. As then the widow had a power to charge the real estate, the deed of 1750 was either not an execution of the power, or at least not such a complete execution as to prevent the subsequent execution from taking effect. The deed of 1750 only recites that it was the intention of the testator to provide for his daughter: but it does not go on to state that the provision then made was in execution of the power; much less that it was made in full and complete execution of it. In *Hervey and Hervey* (a), Lord *Hardwicke* held that a conveyance to trustees was no execution of a power to make a jointure for a wife; it should have been to the wife herself. The same reason applies here, where the conveyance was to trustees. Again, if this deed had been intended as an execution of the power, there was no reason to make the son a party; but all the necessary parties to make the conveyance were called in, which made the assistance of the power unnecessary. But at all events this was not in full execution of the power; and the deed of 1769, which charged other lands with a further portion, was only in further execution of the power, which was not restrained by the will. And in *Zouch v. Woolston* and others (b), and *Hervey and Hervey*, it was held, that a power of appointment may be executed at several times, if nothing appear on the first deed to shew that it was intended as a full execution.

*Adair, contra*, was stopped by the court.

LORD KENYON, Ch. J.—I agree, with the argument at the bar, that a power may be executed at different times, if not fully executed at first, provided that the party, in the whole execution, does not transgress the limits of the power; as in *Zouch* and *Woolston*. But the principal question here is, whether or not this power extends at all to the real estate. The real estate is divided into two branches, one part is devised to his wife for life, with remainder to his sons in succession, remainder to her in fee; the other to the wife in trust for his eldest son in tail, with a remainder over to the youngest son in tail. It is to be remembered also, that the latter devise to the eldest son is a devise of *all other his real estate*; and the personal estate, disposed of by the will, is not given to the wife beneficially, but a part of it is given to her in trust for the youngest son if he should attain the age of 21 years; and another part in trust for

(a) 1 *Aik.* 563.(b) 2 *Burr.* 1136.

either



1788.

DOE  
against  
MILBORNE.

either of the children. Then the testator made a codicil, by which he confirmed his will in every part, and after reciting that he had made his wife executrix, and that he had a daughter born after the making of his will, he added, "I leave it in my executrix's power to give my daughter what proportion she shall think fit." Then what is it over which the executrix, *qua executrix*, has power? It cannot apply to *realty*. He orders the executrix to dispose of that which came to her *as executrix*. Therefore it is extremely clear, that the power was a power within the limits of her authority as executrix; and that can only apply to *personal estate*. It has been ingeniously argued that the codicil was intended to extend to the real estates, because it was attested by three witnesses: but as the codicil was intended to confirm the will in every part, and as there might have been some alteration in his estates, or some other estate might have been purchased between the times of making the will and the codicil, it might have been attested by three witnesses for the purpose of taking in such estates. As therefore the wife had no power, as executrix, over the real estate, the consequence is that there must be judgment for the defendant.

ASHHURST, J. and GROSE, (a) J. concurring,

Postea to the defendant.

(a) *Abf. Buller, J.*

Saturday,  
Nov. 22<sup>nd</sup>.

The KING *against* The Inhabitants of St. NICHOLAS,  
NOTTINGHAM.

If a poor boy be bound apprentice by the parish officers, with the consent of two justices of the county, to a master residing in a different parish and county, and all the parties (except the apprentice) sign the indenture, the apprentice will gain a settlement in the parish of the master by residing there 40 days under the indenture.

THE pauper, *Charles Howell*, who was a poor boy settled in the parish of *St. Nicholas* in the town of *Nottingham*, which is a county of itself, was by indenture dated 19th *December* 1787, by the churchwardens and overseers of the poor of *St. Nicholas*, by the consent of the mayor and one alderman, who were justices of the peace of the town and county of the town of *Nottingham*, residing in the town of *Nottingham*, in or near the said parish of *St. Nicholas*, bound apprentice unto *Joseph Birch* of the parish of *Basford* in the county of *Nottingham*, framework knitter, until 21 years of age. This indenture is under the hands and seals of the churchwardens and overseers of *St. Nicholas*, and allowed by the said justices of the peace of

the



IN THE TWENTY-NINTH YEAR OF GEORGE III.

727

the town and county of the town of *Nottingham*, and signed by *Joseph Birch* the master, *but is not executed by the pauper*; under which indenture the pauper served his master in *Basford* five months, when he was legally discharged under the statute of 20 Geo. 2. c. 29. by two justices of the county of *Nottingham* from his apprenticeship, on account of ill treatment by the master. The boy then became a charge to *Basford*, and was removed to *St. Nicholas, Nottingham*, as the place of his legal settlement; and, on appeal to the sessions, the court confirmed the order, being of opinion that the churchwardens and overseers of the poor, with the consent of the justices of one county, cannot under the act of the 43 of *Eliz.* put out a parish apprentice from one county into another county, unless the apprentice execute the indenture: But subject nevertheless to the opinion of the court of King's Bench, whether the pauper, by the service in *Basford* under the said indenture, and the circumstances of this case, gained a settlement in *Basford* or not.

1788.

The KING  
against  
The Inhabi-  
tants of  
St. NICHOLAS in  
NOTTING-  
HAM.

*Caldecott* in support of the order of Sessions. First, under the express words and spirit of the 43 *Eliz.* c. 2. s. 5. the magistrates of one county have no jurisdiction on this subject in another county. And, secondly, the justices have no power to make a compulsory binding to any person who has not property in the parish to which the apprentice belongs. First, the fifth section of the 43 *Eliz.* c. 2. directs that the churchwardens and overseers, with the assent of two justices, may bind such children *as aforesaid, &c.* Now the word "aforesaid" is explained, by a reference to the first section, to mean *in the same county*. The ninth section enacts that, if a parish shall extend into two counties, the justices of one shall not interfere out of their liberties. And indeed throughout the whole system of the poor laws, and as far as justices derive a jurisdiction from the statute laws, their authority is confined to the limits of the county for which they are appointed. Nay, in this particular instance, the legislature seem to have acted with more than ordinary caution, in directing the justices of the county *residing in or near the same parish* to act. The principal object of the interference of the magistrates in these cases is to guard the interests of the poor apprentices, which can best be effected by their residing near the spot, superintending the parish officers in binding out the apprentices, and knowing the situation and behaviour of the persons to whom they are to be bound. And, notwithstanding what is said in the report



1788.

The KING  
against  
The Inhabi-  
tants of  
St. NICHOLAS  
in  
NOTTING-  
HAM.

of *R. v. St. Margaret, Lincoln*, in *Burr. S. C.* 728, in a manuscript note of that case, *Aston, J.* is made to doubt of the propriety of the decision; and he stated this very clause of the 43 *Eliz.* in order to shew that justices are restrained from interfering out of their respective jurisdictions. The second question has been twice before the court, in *R. v. St. Margaret, Lincoln* (a), and *R. v. Clowerly* (b); in which latter case the court, and *Aston, J.* in particular, observed how hard it would be on the owners of land in *Yorkshire*, who resided in *London*, to be compelled to receive parish apprentices from the former place. And as far as the opinion of the court there goes, it shews that such a binding is not warranted by the statute. And in *R. v. St. Margaret, Lincoln*, the only reason which induced Lord *Mansfield* and Mr. *J. Aston* to be satisfied that the binding to an inhabitant of another parish was proper, was, because it was in the power of the person, to whom the apprentice was bound, to assign him immediately to an inhabitant of another parish. So that they observed no inconvenience would, in reality, be avoided by confining it to inhabitants of the same parish. But in truth the hardship and inconvenience are not thereby avoided; for the first master of the apprentice would not only be obliged to give a sum of money to the second master to whom the apprentice is to be assigned, but is also liable to have him sent back to him again. The legislature cannot be supposed to have intended to permit one parish to throw its burthens on another, by sending its poor all over the kingdom in this kind of servitude. This binding was made under the statute which is compulsory on the apprentice, and therefore it cannot be construed, by inference, to be a binding by consent: and as the apprentice did not in point of fact sign the indenture, it cannot operate as a voluntary binding, so as to give him a settlement under it. In *R. v. St. Margaret, Lincoln*, it was stated, that the indenture was *duly executed*; and therefore the court must presume that the binding was with the consent of the apprentice; for a *due execution* means an *execution by all the parties*.

*Balguy contra.* The first objection turns on the 9th section of the 43 *Eliz. c. 4.* which directs that the justices shall only act within their respective limits; the meaning of which is, that where the poor apprentice who is to be bound does not reside in the county where the justices act, they shall not interfere.

(a) *Burr. S. C.* 728.(b) *Bott.* 389. 1 *Burn's Justice* 66.



In such a case they can have no jurisdiction over the subject, because they have none over the person: but in this case the justices had a jurisdiction over the person, and therefore they had also a jurisdiction over the subject. Secondly, it is objected that the justices cannot make a compulsory binding out of the parish; to support which *R. v. Clowerly* was cited: but there the person to whom the apprentice was bound, and who resided out of the parish, was the appellant; he complained that the justices had no jurisdiction: whereas in this case the master assented, and the objection is made by third persons. But at any rate, the indenture is not absolutely void, it was only voidable; and if an apprentice live forty days under an indenture which is merely voidable, he thereby gains a settlement. And it may be questioned whether the justices have not a power of binding out of the parish; for the statute enables them to bind the children to be apprentices "where they shall see convenient:" the words themselves are general, and no case has yet narrowed them. In *R. v. St. Margaret, Lincoln*, the Court determined that they ought not to be confined to the same parish. Neither does policy or convenience require the rule to be narrowed; for it is infinitely more convenient in many instances to bind children in a parish in the neighbourhood where there is a manufactory, than in the same parish in which the apprentice lives, in which perhaps there is none. The observation made on *R. v. St. Margaret, Lincoln*, that the apprentice himself did sign the indenture, cannot be well founded; for if he had signed, the question could never have arisen; his signature alone would have been sufficient to bind him. And that case goes the full length of determining the present.

Lord KENYON, Ch. J.—This case is of very great importance; because many poor children are bound apprentices into manufacturing counties from counties where no manufactories are established. It seems to me that the case of *St. Margaret, Lincoln*, has decided this; because, on reading that case, no doubt can be entertained but that the indenture was there executed by the churchwardens and overseers only, for no question could have arisen as to the legality of the binding; if the apprentice himself had executed the indenture. If this were to be determined on the words of the statute 43 *Eliz.* alone, they are extensive enough to warrant such a binding as the present; they are to bind apprentices "where the justices shall see convenient;" and whether in or out of the parish

1788.

The King  
against  
The Inhabitants of  
St. Nicholas in  
Nottingham.



1788.

The King  
against  
The Inhabi-  
tants of  
St. Nicho-  
las in  
NOTTING-  
HAM.

parish is not specified, they are not to be limited by any other rule than the propriety of the measure itself. But the great difficulty arose in my mind on another statute, namely, the 8 & 9 W. 3. c. 30. s. 5. That statute, after reciting that doubts had arisen, whether persons to whom poor apprentices were to be bound were compellable to receive them, declares that they shall be compellable to receive them under certain penalties. Now if this act of parliament be commensurate with that of the 43 of *Elizabeth*, and the one cannot be extended beyond the other, it is a powerful restriction of the former statute; for persons residing in one parish cannot be punished for not receiving apprentices bound from any other parish. But I have solved that difficulty in this way; if the master do not reject the binding, but assent to it, then there is the concurrence of all the parties necessary to give validity to the indenture: and if no objection be made to the binding before the apprentice has resided forty days under it, he thereby gains a settlement. However it is the wisest way to abide by former decisions, and that of *R. v. St. Margaret, Lincoln*, has determined this point: and that decision should be the more readily adopted, because a contrary rule would be attended with infinite inconvenience to the public. The legislature seeing that there were many poor persons who had not the benefit of a parental education, and judging very wisely and humanely that some body should take care of them, directed (by the 43 *Eliz.*) that they should be under the management of the churchwardens and overseers of the poor, who were supposed to have the best opportunity of knowing the situation of the poor children, and required the interference of the justices of the peace as a check on the conduct of the churchwardens and overseers. So that it seems the legislature did all that human wisdom could do, by directing the magistrates, with the churchwardens and overseers, to do that for the poor children which their parents could not do for them.

ASHHURST, J.—However doubtful it may be, whether, under the 43 *Eliz.* the churchwardens and overseers, by the consent of the justices, have not a compulsory power of binding out of the parish, under the provision of the act, which says, they shall bind “where they shall see convenient;” at all events there can be no doubt but that they have the power of making such a binding with the consent of all the parties. Now here the master consented by receiving the pauper, and the assent of the pauper may likewise



likewise be inferred from the whole of this case. It is not stated negatively that he dissented; he did not object to the binding, but lived under the indenture five months; that implies his consent; and it was only on the subsequent ill treatment of his master that he applied for a discharge: now that very application is an acknowledgment on his part that the indenture was binding. The pauper then having served more than forty days under the indenture ought to have the benefit of the service. If any objection could be supported against this binding on account of the pauper's being bound out of the county, it would be productive of great inconvenience; for many children, living in parishes where there is no manufacture, would thereby be deprived of an opportunity of being instructed in beneficial trades, and be confined to the stations of day labourers. The case of *St. Margaret, Lincoln*, governs this.

GROSE, J. (a)—I consider that all the parties in this case consented to the binding. If the apprentice had dissented from it, he might have appealed, so might the parish into which the pauper was bound; and by not having appealed they must be taken to have consented. Then this case falls within the determination of *St. Margaret, Lincoln*. And it would be productive of great confusion and inconvenience, if that decision should be departed from in a case like the present, and in which so many persons are concerned. I therefore consider myself as bound by that determination.

Rule absolute, and both orders quashed.

(a) *Abf. Buller, J.*

### The KING *against* JOHN WOODROW.

Saturday,  
Nov. 22d.

A RULE had been obtained to shew cause why an information should not be filed against the defendant for not accepting the office of sheriff of *Norwich*; and another rule for a *mandamus* to the corporation to proceed to the election of a sheriff, the charter day of election being passed.

By the 9 *Geo. 1. c. 9. s. 3.* any person elected sheriff of *Norwich*, worth 3000 *l.* may be excused serving the office, on paying a

paying it for more than a year, unless the corporation agree that he shall be discharged for a longer time. The Court granted an information against the person refusing to take on him the office of sheriff, because the vacancy of the office occasioned a stop of public justice, and the year would be nearly expired before an indictment could be brought to trial.

The payment of the fine fixed by 9 *Geo. 1. c. 9. s. 3.* to be discharged from serving the office of sheriff of *Norwich*, does not exempt the person

1788.

The KING  
*against*  
The Inhabitants of St.  
NICHOLAS,  
in NOT-  
TINGHAM.



1788.

The KING  
against  
WOODROW.

fine of 80 *l.* within fourteen days; but the fourth section provides that "no person shall be discharged from bearing the said office for any longer time than one year, *without the consent of the mayor, sheriffs and commonalty of the city.*" The defendant who was worth 3000 *l.* had been regularly elected to the office, and had tendered his fine *on condition that he should be discharged from serving the office in future*; but this fine was not accepted. It appeared that in several instances the corporation had actually granted a discharge to different persons, who had been chosen sheriffs, from serving every corporate office on paying the usual fine. The two persons chosen sheriffs in *Norwich* make in law but one sheriff; so that in consequence of the defendant's refusing to take upon himself the office, no sessions had been holden there, and indeed it occasioned a total stop to public justice.

On cause shewn *The Court* had no doubt, but that, on the true construction of this act of parliament, the defendant was not entitled to be discharged from serving the office of sheriff for any longer time than a year on paying the fine imposed, unless the corporation expressly agreed to a farther discharge. But they said that, had it not been for the pressing necessity of having this matter investigated in a speedier manner than could have been done by preferring an indictment, which probably would not be determined till just before the expiration of the year, they should not have been enclined to grant the information; for which reason alone they desired it might be understood that this

Rule was made absolute.

The prosecutor's counsel then offered not to prosecute the information, if the defendant would consent to accept the office; to which the defendant, who was in Court, immediately acceded: and a *mandamus* was then granted to swear him in. The second rule had been moved for on the ground that the statute 11 Geo. 1. c. 4. extended to the election of a *sheriff*, or *any other annual officer* of a corporation as well as to the mayor or other head officer, and the case of the corporation of *Scarborough* (a) was cited in support of it: but this question became unnecessary to be considered, as the *mandamus* now granted was only to *swear the sheriff into his office*, and not to proceed to a new election; and the writ was granted without the aid of the statute.

(a) 2 *Str.* 1180.



*Bearcroft, Partridge, Wilson, and Hervey, for the prosecutor.  
Cooper for the defendant.*

1788.

## The KING against LYNN.

Monday  
Nov. 24<sup>th</sup>.

THE defendant having been convicted on an indictment charging him with entering a certain burying ground, and taking a coffin out of the earth, from which he took a dead body, and carried it away for the purpose of dissecting it,

Taking up  
dead bodies,  
even though  
for the pur-  
pose of dis-  
section, is an  
indictable of-  
fence.

*Bond*, Serjt. now moved in arrest of judgment, on the ground that the offence was not cognizable in any court of criminal jurisdiction: if it be any crime, it is of ecclesiastical cognizance. The crime imputed to the defendant is not made penal by any statute: the only act of parliament, which has any relation to this subject, is that of 1 Jac. 1. c. 12. (a) which makes it felony to steal dead bodies for the purposes of witchcraft; but that clearly cannot affect the present question. And the silence of *Hale*, *Hawkins*, and *Stamford*, upon this subject is a very strong argument to shew that there is not any such offence cognizable in criminal courts. In 3 *Inst.* 203. Lord *Coke* says "It is to be observed that in every sepulchre, that hath a monument, two things are to be considered, viz. the monument, and the sepulture or burial of the dead; the burial of the cadaver is *nullius in bonis*, and belongs to ecclesiastical cognizance; but as to the monument, action is given at the common law for defacing thereof." So that it was also the opinion of Lord *Coke* that the present charge is not the subject of an indictment in a criminal court. There is an instance in 3 *Inst.* 45. of a person being taken with a head and face of a dead man, with a book of sorcery, and was brought into the King's Bench, but no indictment was preferred against him; and the only crime imputed to him was that of being a forcerer. And all the writers on this subject have considered the injury which is done to the executors of the deceased by taking the shroud, and the trespass in digging the soil; taking it for granted that the act of carrying away a dead body was not criminal.

*Garrow*, who was to support this motion, mentioned that perhaps the circumstance, stated in this indictment, of the de-

(a) This statute is repealed by 9 Geo. 2. c. 5.

defendant's



1788.

The King  
against  
LYNN.

defendant's taking the body *for the purpose of dissection*, might differ this from the common case of taking up dead bodies for any indecent exhibitions. And, on the Court asking whether this question had not been considered in the case of one *Young* a few years ago, he observed that this case was very distinguishable from that; for there the master of *Shoreditch* workhouse, a surgeon, and another person, were indicted for a *conspiracy to prevent the burial of a person* who died in the workhouse. But

*The Court* said that common decency required that the practice should be put a stop to. That the offence was cognizable in a criminal Court, as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence. And that as it had been the regular practice at the *Old Bailey* in modern times to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments was a strong proof of the universal opinion of the profession upon this subject. They therefore refused even to grant a rule to shew cause, lest that alone should convey to the public an idea that they entertained a doubt respecting the crime alleged. But inasmuch as this defendant might have committed the crime merely from ignorance, no person having been before punished in this Court for this offence, they only fined him five marks.

## HALL against BUCHANAN.

Monday,  
Nov. 24th.

Plaintiff is not bound by the practice of this Court, to give notice of trial till the term after that in which issue is joined.

THE issue in this cause, which was a country cause, was joined early enough in last *Trinity* term to have given notice of trial for the Summer Assizes; and because no such notice had been given, a rule was obtained to shew cause why there should not be the like judgment as in case of a nonsuit; the practice in the Common Pleas being conformable to this rule. It was now answered that, whatever might be the practice of any other Court, the plaintiff in this Court was not bound to give notice of trial, till the term succeeding that in which issue was joined; and that in this case the plaintiff had given notice of trial in this term. And

The



*The Court*, being of that opinion,

Discharged the rule.

*Lane* in support of the rule. *Baldwin* against it.

1788.

HALL  
against  
BUCHANAN.

The KING against MARK TERRET.

Monday,  
Nov. 10th.

A RULE having been obtained to shew cause why a *certiorari* should not issue, directed to the justices of the peace of the county of *Gloucester*, to remove all orders and adjudications concerning a certain judgment and conviction of *Mark Terrett*, by the Reverend *George Hayward*, clerk, one of his Majesty's justices, &c. for buying fifteen pounds of *Spanish* ends of yarn fresh scribbled, contrary to the statute, &c. Cause was shewn on a former day by *Bower*, *Clyfford*, *Bragg*, and *Dauncey*; and *Bearcroft* and *Russell* argued in support of the rule.

The adjudication of the last *Easter* Sessions for *Gloucester*, after reciting, that a conviction of the defendant on the 31st *March* 1788, before Mr. *Hayward*, on the evidence of *Thomas Burrough*, for buying 15 pounds of *Spanish* ends on the 25th of *March*, was returned to the Sessions; and also reciting that on the 7th *February* 1788 the defendant was committed by Mr. *Hayward* to the house of correction till the general quarter sessions at *Easter*, for buying of one *Evans* seven pounds of *Spanish* ends; proceeded thus: "And which conviction on examination of the circumstances of the case hath been by this Court ordered to be quashed; and they order that the conviction for buying the 15 yards of *Burrough* be confirmed, and that the defendant be and he is hereby adjudged an incorrigible rogue, and that he be kept and detained to hard labour in the house of correction of this county for the space of two years, to be computed from this present Sessions."

By the 12 *An. st. 2. c. 23. s. 6.* incorrigible rogues are to be committed by one justice till the next sessions, when they are to be whipped three times, and kept to hard labor for such further time as the Sessions shall think fit. The statute 13 *Geo. 1. c. 23*, for the better regulation of the woollen manufacture, which created several penalties for certain offences therein specified to be recovered before two justices, gave an appeal (by the 6th section) to the Sessions; but enacted that neither the order

If a statute, creating an offence, give cognizance of it to one justice, with an appeal to the sessions, and take away the *certiorari* as to all the proceedings, and afterwards further powers for the punishment of the offender are given to the Sessions by another statute, which does not take away the *certiorari*; the clause for taking away the *certiorari* in the former act cannot be extended to the proceedings under the latter. Therefore where there have been proceedings under both statutes, those under the former act cannot be removed, but those under the latter may.



1788.

The King  
against  
TERRT.

of the Sessions, nor the proceedings of the justices out of Sessions, should be removed by *certiorari*. The 8th section of that statute then directs that any person, who shall be convicted of buying ends of yarn, &c. before one justice shall be deemed an incorrigible rogue, &c. in the same manner as is directed by the 12 *An. st. 2. c. 23*. After the passing of this latter act the 12 *An.* was repealed by the 13 *Geo. 2. c. 24*; which was itself repealed by the 17 *Geo. 2. c. 5*. This last statute declares (*sect. 5.*) that all end-gatherers offending against the 13 *Geo. 1. c. 23*. shall be deemed incorrigible rogues within the meaning of the act: and the 9th section enables the justice at the next Sessions to order incorrigible rogues to be kept in prison for any time not exceeding two years, nor less than six months from the Sessions: and by this latter act the *certiorari* is not taken away.

In support of the rule it was insisted that all the proceedings, subsequent to the conviction before the justice, were under the 17 *Geo. 2.* which act did not take away the *certiorari*; and the provision in the statute of the 13 *Geo. 1.* which says that proceedings under that act shall not be removed by *certiorari*, cannot be incorporated in the latter act. For it is an indisputable rule that nothing but express words can take away a *certiorari*; whereas if it were decided that the *certiorari* was taken away by the statute of the 17 *Geo. 2.* which expressly takes notice of the offences against the 13 *Geo. 1.* and which is utterly silent respecting the *certiorari*, it would be taking away a *certiorari* by implication.

On the other side it was contended that the statute 17 *Geo. 2. c. 5.* only increased the punishment, and that the provision of the 13 *Geo. 1.* respecting the *certiorari* was applicable to the 17 *Geo. 2.* as well as to the 12 *An. st. 2. c. 23*. That if the argument, urged by the counsel in support of the rule, was entitled to any weight, it would go the length of saying that no *certiorari* could be taken away but by the same act of parliament which inflicts the punishment: but the reverse of that was determined in the case of the *King v. Abbot (a)*.

The Court took time to consider this question. And

Lord KENYON, Ch. J. now said,—they were of opinion that in the proceedings, as far as they were under the 17 *Geo. 2. c. 5.* the *certiorari* was not taken away: but they were clearly of opinion

(a) *Dougl. 553. n. 113.*

that



that it was on the order of the magistrate under the statute of the 13 Geo. 1. c. 23. They therefore made the Rule absolute for a *certiorari* to remove the order of Sessions only.

1788.

The King  
against  
TERRET.

LAROCHE against WASBROUGH and MAILAND.

Monday,  
Nov. 24th.

**F**INAL judgment was signed against both the defendants for 540*l.* 10*s.* in *Trinity* term 1787. *Mailand* was arrested and committed to prison for want of bail, but was not charged in execution in the next term after judgment, according to the regular course of proceedings. *Wasbrough*, in *Michaelmas* term 1787, brought a writ of error in the Exchequer Chamber, (to which *Mailand* was no party) where the judgment was affirmed in *Hilary* 1788, and 15*l.* given as costs. There was a joint execution against both the defendants for 555*l.* 10*s.* under which both the defendants were charged in execution.

If plaintiff recover a judgment against two defendants in *B.R.* and one of them bring a writ of error in *cam. scacc.* the plaintiff cannot charge the other defendant in execution till the record be remitted into the court of *B.R.* notwithstanding the writ of error might have been quashed immediately, because not brought by both defendants.

*Baldwin*, obtained a rule to shew cause why the defendant *Mailand* should not be discharged out of execution on two grounds; 1st. because he was not charged in execution within two terms after final judgment; and 2dly. because he was charged in execution for the costs of the writ of error, to which he was not a party.

In such a case where the judgment was affirmed in *cam. scacc.* and costs given of the writ of error, and both the defendants were taken under a writ of execution on the whole sum, including the costs of the writ of error as well as the original sum recovered, this court permitted the plaintiff

*Holroyd* on a subsequent day moved to enlarge that rule, and also for a rule to shew cause why the *committitur piece* and the record of the *committitur* should not be amended by striking out 555*l.* 10*s.* and inserting 540*l.* 10*s.* instead thereof; the costs of the writ of error having been added by mistake.—Both these rules now coming on together,

*Holroyd* shewed cause against the first. Though the writ of error was irregular, and might have been quashed, because it was sued out by one defendant alone, yet it removed the record out of this court; it operated as a *superfedeas*; and no execution could issue out of this court till the writ of error was quashed, and the record remitted here. 2 Lord Raym. 1403. 1 Str. 696. *Ginger v. Cowper* and another. Rep. Temp. Hardw. 135. In *Howard v. Pitt (a)* it was held that where a writ of error determines in the Exchequer Chamber by abatement or discon-

to amend his writ of execution as to the defendant who did not join in the writ of error, by altering it to the original sum recovered.

(a) Salk. 261.



1788.

LAROCHE  
against  
WAS-  
BROUGH  
and  
MAILAND.

tinuance, the judgment is not again in this court till a *remittitur* be entered; for without such *remittitur* it cannot appear to the court of *B. R.* but that the writ of error is still pending in the Exchequer Chamber. In support of the second rule, he contended that the plaintiff was entitled to amend his execution, the larger sum having been inserted by mistake. In such cases the Court is always inclined to permit the party to make an amendment, if by law it can be done, rather than that he should lose the fruits of his judgment; and the Court will be the more inclined to do so in this instance where the defendant has not been damnified. In *Browne v. Hammond* (a), the defendant had been taken on a *ca. sa.* by a wrong christian name, but the Court suffered the plaintiff to amend. And in *Hunt v. Kendrick*, (b) where the defendant was taken on a *ca. sa.*, returnable in *B. R.* instead of *C. B.*, the Court directed the writ to be amended. Now that is a stronger instance than the present, because there the writ, without an amendment, would have been absolutely void. But this application is only to amend by the judgment and other proceedings in this cause; and it is the constant practice to permit amendments where there is any thing by which they can be made. In *Mace qui tam v. Lovett* (c), which was an action for usury, an amendment was permitted of sums in the declaration.

*Baldwin* in support of the first rule. The defendant *Mailand* cannot be prejudiced by the proceedings in the Exchequer Chamber, of which he had no knowledge. The writ of error by the other defendant was a mere nullity, and the plaintiff might have nonpros'd it immediately; or he might have charged *Mailand* in execution, notwithstanding the writ of error brought by the other defendant. As to the other rule for amending; there is no judgment by which this could have been amended. But even if there were, there is no case in which an amendment has been made in an execution for a larger sum than is due, under which the defendant has suffered imprisonment. It does not appear in any of the cases cited that the defendant was super-sedeable for not being regularly charged in execution, which distinguishes this case materially from those cited.

*Per Curiam.* As to the first rule: The writ of error removed the record into the Exchequer Chamber, and till it was remitted here, there was no record in this Court, on which the

(a) *Barn.* 10.(b) 2 *Bl. Rep.* 836.(c) 5 *Burr.* 2833.

plaintiff



plaintiff could have charged the defendant in execution.—On the question of amendment,

1788.

Lord KENYON, Ch. J. said,—The justice of the case requires that we should permit the plaintiff to amend; if the defendant *Mailand* had indeed suffered by the excess in the execution, that might have varied the case; but here he has not sustained any damage by it. Perhaps none of the cases cited go quite so far as the present: but the principle of them extends to this case; therefore I think the plaintiff should be at liberty to amend, as there is something by which the amendment may be made. What was done in the Exchequer Chamber is a nullity as to this defendant; but when the record is remitted here, it stands as a judgment against him in this Court.

LAROCHE  
against  
WAS-  
BROUGH  
and  
MAILAND.

BULLER, J.—This case stand thus; There was a judgment in this Court against two defendants; a writ of error was brought by one of them, on which a judgment was given in the Exchequer Chamber affirming the judgment here, and giving 15*l.* costs. That therefore is only a judgment against that defendant who brought the writ of error; consequently the judgment in this Court against this defendant stands as it did before, unreversed. And notwithstanding the judgment in the Exchequer Chamber against the other defendant, we must take notice of what was originally recovered in this Court against both the defendants. Then as it stands upon the record here as a clear sum due on the judgment originally given in this Court, there is something by which the amendment may be made. There is no case precisely similar to the present; but on principle, this is not to be distinguished from the case cited in *Barnes*: In that case the plaintiff would have been liable to an action of false imprisonment, though the sheriff would have been protected by the writ. And there the execution was not warranted by any judgment; but the Court said they would make it correspond with the true judgment.

The first rule was discharged, and the second made absolute.

DOE on the Demise of COORE against CLARE.

Monday,  
Nov. 24<sup>th</sup>.

EJECTMENT for copyhold premises at Hendon, tried before Lord Kenyon at the last Sittings at Westminster.

An instru-  
ment on an  
agreement  
stamp, recit-  
ing that *A.*  
in case he

should be entitled to certain premises on the death of *B.* would immediately demise the same to *C.* declaring that *he did thereby agree to demise and let the same*, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise.



## CASES IN MICHAELMAS TERM

The lessor of the plaintiff proved payment of rent by the defendant, and notice to quit; and there rested the case. The defendant produced a paper writing, written upon an agreement stamp, under the hand and seal of *T. Tidd*, of whom the lessor of the plaintiff purchased, as follows; "Be it remembered that it is agreed this 4th of *October* 1786, between *Thomas Tidd* of the one part, and *Thomas Clare* of, &c. of the other part; Whereas *Mary Statbam* widow is seised of or well entitled unto &c. (and describing the premises, which were copyhold,) for her life and the said *Thomas Tidd* hath agreed with the said *T. Clare* that in case he shall be seised of or entitled unto the said messuage, &c. on the death of the said *Mary Statbam*, he will immediately on the death of the said *Mary Statbam* demise and let the same to the said *T. Clare* on the terms and conditions hereafter mentioned; now therefore the said *T. Tidd* doth hereby agree to demise and let unto the said *T. Clare* All, &c. and all such copyhold premises as he shall or may be entitled to on the death of the said *Mary Statbam*, at *Hendon* aforesaid, to hold the same premises unto the said *T. Clare*, his executors, &c. from and immediately after the death of the said *Mary Statbam*, for the full and whole term of 21 years from thence next ensuing, and fully to be complete and ended, at and under the yearly rent of 12*l.* 12*s.* clear of all taxes (except the land-tax) payable quarterly; the first payment to be made on the first quarter-day next after the death of the said *Mary Statbam*. And the said *T. Clare* for himself, his executors, &c. doth hereby covenant, promise, and agree, with the said *T. Tidd*, his heirs, and assigns, to take the said premises for the time above mentioned, and to pay the said yearly rent in manner aforesaid; and that he the said *T. Clare* his executors, &c. before the expiration of the said term of 21 years shall and will lay out and expend the full sum of 150*l.* in the needful and necessary repairs and improvements of the said premises; and shall and will keep the said premises in good repair during the said term; and surrender up the same in good repair at the end of the said term, (accidents by fire, &c. excepted). And the said *T. Tidd* doth hereby promise and agree to and with the said *T. Clare*, his executors, &c. that he the said *T. Tidd*, on the death of the said *Mary Statbam*, and on his becoming entitled to the said premises, shall and will procure a licence to let the said premises; and that the said *T. Clare*, his executors, &c. shall peaceably and quietly have, hold, occupy, and enjoy the same



IN THE TWENTY-NINTH YEAR OF GEORGE III.

same for the said term of 21 years, without any interruption, &c. of or by the said *T. Tidd*, or any person or persons claiming or to claim the said premises, by, from, or under, him.

His Lordship was of opinion at the trial that this instrument amounted to a lease, there being words of present demise contained therein, and therefore non-suited the plaintiff.

In this term *Marryat* moved the court to set aside the nonsuit and grant a new trial; contending that the paper writing in question was only an agreement for a lease, and not a lease itself, and that consequently it was no legal bar to an ejectment by this plaintiff, notwithstanding the case of *Weatly* dem. *Yea v. Bucknell* (a), which case has been since doubted by the Lord Chancellor, in the case of *Sir James Lowther and another v. Lady Andover* and others (b). As to the principal question whether this instrument be an agreement for a lease or an absolute lease, what is said by Lord Ch. B. *Gilbert* (c), in treating upon the distinction between the two, is very strong in confirmation of what is now contended for. He there says that if the most proper and authentic form of words, whereby to describe and pass a present lease for years, are made use of, yet if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties. Now here the intention of the parties appears strongly upon the face of this instrument to be only *executory*. At the time it was entered into *Tidd* the grantor was only a reversioner; he had nothing then to demise; the agreement itself states that he would only be entitled *in case of the death of M. Statbam*: on this part of it therefore there can be no doubt. The only difficulty which at first view presents itself arises from these words; "now therefore the said *Tidd* doth hereby agree to demise and let," &c.; but that is only a reduction of the antecedent agreement of the parties into writing, and is equally referable to the time when *Tidd* should become possessed. Besides it is highly deserving of attention that this is a *copyhold estate*, and that to construe this into a present demise would make it operate as a forfeiture of the estate to the lord, no licence having been obtained for that purpose: Whereas the parties have cautiously guarded against such a forfeiture by an express stipulation to procure such a licence when the estate should come into possession. And even without that

(a) *Comp.* 473.

(b) 1 *Brown, Rep. in Chan.* 397.

(c) 3 *Bac. Abr.* 419.

strong



1788.

Doe  
against  
CLARE.

strong corroborating reason, in the case of *Goodtitle dem. Esstwick v. Way* (a), where the lessor agreed to let and the tenant to rent and take, &c. and there was a clause for immediate entry, yet there being also a proviso for a lease to be executed *in futuro*, the court relied on that circumstance to shew that it was the intention of the parties that the instrument should only operate as an agreement for a future demise. As to the case of *Prosser v. Phillips* (b) which was mentioned by Lord Kenyon at the trial, it is not applicable to this case: the words there were "doth let and sell for the term of three years", which clearly evinced an intention to make a present demise; but here the intention as plainly appears to have been executory. Another argument as to intent may fairly be drawn from the circumstance of the stamp being such as is required for agreements, and which would not have been a proper one for a lease.

*Bearcroft* and *Shepherd* shewed cause; insisting that there were many authorities both antient and modern to warrant the opinion delivered by the learned judge, that this was a lease, and not merely an agreement. The intent of the parties was to pass a present interest, although the possession was to commence *in futuro*. The argument to shew that this is an executory agreement would be very strong if the deed had stopped at the reciting part, which has been relied on; but then it proceeds actually to grant and let to the defendant in words of present demise in consequence of the previous agreement. Then notwithstanding the word "agreed", and the recital in the lease, it is in point of law a present demise though the possession is to commence *in futuro*. In *Baxter* on the demise of *Abraham v. Brown* (c), where the lessor "agreed with all convenient speed to grant a lease to the defendant of, and he did thereby set and let to him, all that, &c." This was held to be a present demise, although there was an agreement to execute a more complete lease *in futuro*. That was a stronger case than the present, because there was an express agreement to grant a lease; but as they were followed by other operative words of immediate grant, namely, "thereby set and let," it was held to be a present demise. Now the words in this instrument are equally operative as those, and equally shew the intention of the parties to make

(a) *Ante* i vol. 735.*Perrot, Bull. N. P. 269.*(b) *Hereford, Summer assizes 1765, cor.*(c) 2 *Blac.* 973.



a present demise. And through the whole of the subsequent part of the instrument the parties consider this as an existing term actually created: For in the covenant to repair and pay rent, it says "*during the said term*"; and again in the covenant to yield up, it says "*at the end of the said term*"; and there is besides an independent covenant for quiet enjoyment, which is decisive that this was a lease. *Hob. 34.* So in *Drake v. Munday* (a) where the plaintiff "covenanted, granted, and agreed, "that he should have and enjoy the premises for six years, "and the other covenanted, granted, and agreed, to pay an "annual rent", it was held to amount to a lease, and that the words were sufficient to make a reservation of rent. The principle, which governs these cases, is that where there is a written agreement between the parties, and the one who has the disposition of the land agrees that the other shall have it for a certain term, and on certain conditions, and the other agrees to take it on those conditions, there it operates as a lease to bind the parties. Therefore in *Tisdale v. Essex* (b) where the plaintiff promised and agreed that the defendant *haberet, occuparet, et gauderet*, certain lands, &c. the Court determined that those were perfect words to give the interest; notwithstanding there was also an express agreement that a lease should be executed *in futuro*. *Maldon's case* (c) is even considerably stronger than the present. There one said to another "you shall have a lease of my lands paying therefore 10 s. *per ann.*; make a lease in writing, and I will seal it." This was agreed to be a good lease by parol, though it were not reduced to writing; and that the making of it in writing was but for further assurance. That was before the statute of frauds; but it is an authority to shew that, if the same agreement had been now reduced to writing, it would be good. The case stated too in *Dy. 125, pl. 44.* is peculiarly applicable to the present; for there one, who was seised of a reversion, expectant on the determination of an estate for life, granted to A. after the death of his tenant for life, that the land should remain to him for 20 years afterwards; and that is said to be a lease. The covenant to procure a lease cannot vary this case, for that is like a covenant in the case cited to do something in future for further assurance. The only instance in which the contrary has been held is in *Sturgeon v. Painter* (d); on the au-

1788.

Doz  
against  
CLARE.

(a) Sir William Jones 231. Cro. Car. 207.

(c) Cro. Eliz. 33. and Moor 31.

(b) Hob. 34. and 1 Rol. Abr. 847. X. 1.

(d) Nay. 128.



1788.

Doe  
against  
CLARE.

thority of which the case of *Estwick and Way* (a) rests; where it was held that though there are words of present demise, yet if the instrument also contain a clause for a lease to be executed *in futuro*, that destroys the present demise by shewing the intent of the parties to have been only executory. But the case in *Noy* was cited in that of *Baxter and Browne* (b), and no stress was laid on it by the Court, who decided the other way; therefore it must be taken to have been over-ruled. And as to the objection to the construction contended for, that if this be taken to be a lease, it will work a forfeiture; that cannot be made by any person claiming under the copyholder; and in 2 *Mod.* 79. that sort of objection was over-ruled. Then, in respect to the stamp being such as is generally used for agreements only, that can never alter the legal operation of the instrument, if in point of law it is a lease. And if it cannot destroy the operation of the deed, it can have no effect on the intention of the parties. But even allowing this to be only an agreement, under which the defendant has since actually taken possession, according to the case of *Weakly dem. Yea v. Bucknell* (c) the plaintiff who claims title under the same person who made it, cannot recover the possession from the defendant.

The further consideration of this case was adjourned on account of the lateness of the day. And now

Lord KENYON Ch. J.—Without hearing the counsel on the other side, said that, having consulted with the other judges, he was clearly convinced that he was mistaken in the opinion which he had held at the trial; and that they were all of opinion that the instrument in question was an executory agreement only, and not a lease, for two reasons. First, because if this were held to be a lease, a forfeiture would be incurred; whereas that would be contrary to the intent of the parties who have cautiously guarded against it by the insertion of a covenant that a licence to lease should be procured from the lord. And, secondly, the stamp is conformable to the nature of an agreement for a lease, and not adapted to an absolute lease.

Rule absolute (d)

(a) *Ante* 1 vol. 735.

(b) 2 *Blac.* 973.

(c) *Cowp.* 473.

(d) This cause was tried again at the Sit-  
tings after this term, when a verdict was  
given for the plaintiff; and Lord Kenyon Ch.

J. before whom it was tried, said that  
it was the opinion of all the Judges that  
the rule in *Weakly dem. Yea v. Bucknell*, *Cowp.*  
473. at all events could not extend to the  
case of a purchaser.

BUCHANAN



1788.

Monday,  
Nov. 24th.BUCHANAN *against* PARNSHAW.

**T**HIS was an action on the warranty of a horse against the seller, tried before *Grose J.* at the Sittings after last term. The circumstances of the case were these; the horse was sold at a public auction, warranted six years old and sound; and one of the conditions of the sale at the auction was that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days, otherwise he should be deemed sound. Ten days after the sale the plaintiff discovered that the horse in question was twelve years old, and then the defendant refused to receive him; and the plaintiff sold him. It was proved that the horse was twelve years old: But the jury were of opinion that the plaintiff, by not returning the horse sooner, had made him his own, and gave a verdict for the defendant. And a rule having been obtained to set aside that verdict,

*Erskine* now shewed cause, and observed that the plaintiff had precluded himself from rescinding the contract by selling the horse. Besides by one of the conditions of sale the horse should have been returned in two days: and though, strictly speaking, *soundness* did not apply to this case, yet the spirit of the condition was that, if a purchaser found *any objection* to the horse, he should return him within the time limited.

*Bearcroft*, in support of the rule, insisted that the condition of sale was not applicable to a case like the present. Where a horse is objected to as unsound, it is extremely material that he should be returned within a certain time, to prevent all disputes respecting the time when the horse became unsound; because if no objection were to be made on that account till a long interval had elapsed, the unsoundness might perhaps be occasioned in that interval. And it is for that reason that it is made a condition of sale at all public auctions that the horse if objected to as unsound shall be returned within a short limited time. But neither the terms, nor the spirit, of the condition extend to a case like the present. And with respect to the plaintiff's selling the horse; he was discharged from the obligation of keeping him by the defendant's refusing to receive him.

Lord

If a horse sold at a public auction be warranted sound and six years old, and it be one of the conditions of sale that he shall be deemed sound unless returned in two days, this condition applies only to the warranty of soundness. Therefore where a horse sold with such a warranty was discovered to be 12 years old ten days after the sale, and was then offered to the seller who refused to take him, it was holden that an action might be maintained by the buyer against the seller, and his right to recover is not affected by his having sold the horse after offering him to the defendant.



1788.

BUCHANAN  
against  
PARNSHAW.

Lord KENYON Ch. J.—There is no doubt but that the defendant ought to have taken the horse again. The question turns on the meaning of this condition of sale; and I am of opinion that it must be confined solely to the circumstance of *unsoundness*. There is good sense in making such a condition at public sales; because, notwithstanding all the care that can be taken, many accidents may happen to the horse between the time of sale and the time when the horse may be returned, if no time were limited. But the circumstance of the age of the horse is not open to the same difficulty. This is therefore a verdict against evidence.

*Per Curiam,*

Rule absolute.

Monday,  
Nov. 24th.

MARDINER against ELLIOT.

Where a copyhold estate is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, he cannot cut timber growing on the estate.

**T**ROVER for the value of some elm trees which had been growing on a copyhold estate in the manor of *Abberley*, of which the bishop of *Chichester* was lord, which estate the plaintiff was entitled to in right of his wife, whose admittance on the death of her father was *to hold to her and her heirs for three lives*. Upon a rule to shew cause why the verdict which had been given for the plaintiff should not be set aside and a new trial granted, Lord *Loughborough*, before whom the cause was tried at the last assizes for *Suffex*, reported the evidence as follows. The plaintiff called *Ovendon*, the bishop's woodward, who proved that the trees in question had been cut down by the plaintiff; that the bishop had before given him, *Ovenden*, orders to cut them down, but before he got there the plaintiff had done it; but he had seized them for the bishop, and sold them to the defendant for 37 *l.* who carried them away. He said also that he had cut timber for the bishop upon the copyhold lands of this manor, not being copyhold of inheritance; and that the custom was that a copyholder for life, as the plaintiff was, had no right to cut timber. It appeared by another witness, that the father of the plaintiff's wife had cut timber off this estate 45 years ago, but it was not known what became of it. And a third witness who had known the manor 40 years, said, that 24 years ago he had bought 36 elms of the same person which were felled upon this estate. In answer to which



which the defendant called *Ovendon* a second time to prove that in 1771 the bishop had taken trees growing on the copyhold of one *Merritt* who was a copyholder for life, which trees had been sold to the last witness, but the latter observed that *Merritt* was either dead or dying at the time. The jury found a verdict for the plaintiff.

1788.

MARDINER  
against  
ELLIOT.

*Erskine* obtained a rule to shew cause why the verdict should not be set aside on two grounds; 1st. That the custom, under which the plaintiff claimed, was bad in point of law: and 2dly. Even if it were good, that it was not supported by the evidence.

*Rous* now shewed cause, and admitted that a copyholder for life only was not entitled to cut timber; but contended that where a copyhold estate descended, as in the present case, from the ancestor to the heir in succession, though granted for three lives, the copyholder may establish such a right. In this case the estate was granted to the plaintiff's wife and her heirs, and was renewable as the lives dropped; so that it is *quasi* an estate of inheritance. In *Rowles v. Mason* it was held that a copyholder for life, who by the custom had power to nominate his successor, might cut timber, *car il est quasi un copyholder en fee.* 1 *Roll. Abr.* 560. pl. 18. cited in *Cro. Car.* 221. (a). This determination was made on a principle of policy; because if a copyholder, who has the power of renewing his estate after the three lives fall in, had not the right of cutting timber, it would put a total stop to the growth of timber on all such estates. And in *Chantrell v. Randall*, 1 *Lev.* 21. it was held that the widow of a copyholder for three lives was entitled to her free bench. In the case of a freehold estate granted to a man and his heirs, but determinable on any contingency, e. g. the falling in of three lives, there can be no doubt but that such a grantee has an estate of inheritance with all its incidents, and among others the right of cutting timber. By analogy therefore in such a case as the present, where the plaintiff has *quasi* an estate of inheritance, and which, though determinable on lives, is renewed afterwards and continued in *infinitum* to the heirs of the grantee, the grantee is entitled to similar privileges. On the second ground, it is sufficient to say that there was evidence on both sides, and the jury have already exercised their judgment upon it.

The counsel in support of the rule were stopped by the Court.

(a) This case is more fully reported in 1 *Brownl.* 132. and 2 *Brownl.* 85.



1788.

MARDINER  
against  
ELLIOT.

Lord KENYON, C. J.—This case is strongly against the plaintiff, both on the law and on the facts. The plaintiff's counsel has been obliged to assume as a ground of his argument that which fails him, namely, that this is *quasi* an estate of inheritance; and it has been argued as if the tenant had a power of compelling the lord to renew after the dropping in of the lives. Such was the first case, which has been cited by the plaintiff's counsel; where as the tenant had a power of nominating his successor, his estate was *quasi* an estate of inheritance, and then by analogy they borrowed the rules of the common law relative to estates of inheritance. But in the present case the tenant has no such power; and therefore the argument does not apply. Neither does it follow that the custom in this case can be supported, because the widow of a copyholder for lives may be entitled to her free bench: the privilege of free bench does not shew it to be an estate of inheritance; for a copyholder for life may have in some instances such an excrescence growing out of his estate, though, generally speaking, the tenant of such an estate has not. Therefore I am of opinion that the custom attempted to be set up in this case is against law, and cannot be supported. But upon the second ground also I should have thought the case clearly with the defendant. For the evidence given in support of the custom is extremely weak, when compared with that given against it.

ASHHURST, J.—Without entering into the question of law, was clearly of opinion that the verdict was against the weight of evidence.

BULLER, J.—I agree with my Lord Chief Justice on both points. The custom cannot be supported in point of law. And if it could, it was incumbent on the plaintiff to prove that custom, because his title rests solely on it; but there is no *equilibrium* in the evidence given at the trial. It may be true that one of the tenants may have cut timber, and the lord not know of it; but in the contrary instance it appears that the lord actually took away the timber and sold it. And one act of resistance is much stronger than many acts of exercise without notice.

GROSE, J.—Of the same opinion.

Wharton v. King before Lord Kenyon at the summer Assizes for Hereford 30. July 1795. I see now as to this case Anstenth. 4p. 659. Rule absolute. In this case two out of 3 lives, during which certain copyhold premises part of the manor of D. were held, had dropped: & the questions were two first whether the lord was compellable to renew; secondly upon what terms fine, there being no fine ascertained by the custom. Lord Kenyon said, there was no manor in this kingdom, where it was at the arbitrary will of the lord, whether to renew or not. The tenants held secundum consuetudinem manerii. If no fine certain, the lord could not even in the case of copyholds in fee, claim more than two years value, & cited a case of Leake v. Lord Fitzgibbon some years ago before Sir Joseph Yates at Exeter, one of the greatest judges that ever dispensed the law, where Sir Joseph Yates so held, & no new trial was moved for. His Lordship had always acted upon, & considered himself as bound by that authority. He cited Dunn v. Green 3. P. W. 9. It relates to a custom of a manor, & as to the right of renewal without some evidence of a custom; & see my Morgan v. Ludmore 4p. 114. X

X Thomas before Lord Kenyon at the summer Assizes for Hereford 30. July 1795. 4p. 659. Rule absolute. Doe



1788.

Monday,  
Nov. 24th.

## DOE on the Demise of CRISP against BARBER.

THE lessor claimed a rectory house, &c. by lease from the rector for 21 years, dated the 27 *March* 1786. In the *July* following the former tenant, the rector, and the lessor of the plaintiff, had come to an agreement, on issuing a writ of possession under an ejectment brought by the lessor and the rector, that the lessor of the plaintiff should have the possession. At *Lady-day* 1787, the lessor received possession from that tenant; and in *August* 1787 he paid the rent up to *Lady-day* 1788. On the 17th of *March* 1788 the defendant entered without any color of title. There were two demises in the declaration; the one on the 6th of *April* 1787, and the other on the 17th *March* 1788. On the trial the defendant relied on the 13 *Eliz. c. 20.* which enacts "that no lease of any benefice, &c. or any part thereof shall endure any longer than while the lessor shall be ordinarily resident without absence above fourscore days in one year; but that every such lease immediately upon such absence shall cease and be void." The rector in the present case was wholly resident in another place. A verdict was found for the defendant, with liberty to move the Court to set it aside and to enter a non-suit. And a rule to shew cause having been obtained,

*Dayrell, Coke, and Gally*, now shewed cause; and contended that even supposing the statute of *Elizabeth* rendered the lease void as between the parties themselves, yet a third person had no right to question it, and particularly a stranger, who had not even a pretence of claim. Even as to the rector himself, the statute does not require such a construction as should make the lease void without any notice. But even supposing it void, it became so at the end of the first 80 days, and then the proceedings under the writ of possession in *July* 1786, and the acceptance of rent in *August* 1787, would either of them amount to a re-demise. In a common case between landlord and tenant, the very permission to continue in possession would be construed to make the lessor of the plaintiff tenant from year to year.

*Newnham and Balguy*, in support of the rule, were stopped by *The Court*; who declared they were sorry that such a possession as that of the defendant should find a shield from an act of parliament, the policy of which, whatever it was at the time when

it

A lease of a rectory house, &c. by a rector becomes void by 13 *El. c. 20.* by his non residence for 80 days, of which a stranger may take advantage. And there is no distinction between a demise by deed or by parol. So that his lessee cannot maintain an ejectment against a stranger, who enters without any title whatever.



1788.

DOE  
against  
BARBER.

it was passed, might now at least be much doubted. That according to the maxim, *expressum facit cessare tacitum*, the lessor's title under the lease excluded the suggestion of a subsequent demise. And even that would be equally void; since the act of parliament would affect a parol demise as much as a demise by deed. And therefore though the defendant was a stranger and a wrong doer, the plaintiff could not recover in this action.

Rule absolute for entering a nonsuit.

Tuesday,  
Nov. 25th.

HORWOOD against SMITH.

The owner of goods stolen, prosecuting the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession.

**T**ROVER for sheep, tried at the last Summer Assizes in Oxfordshire, before Perryn, Baron, when a verdict was found for the plaintiff, subject to the opinion of this Court on the following case. On the 29th of June 1787 the plaintiff, who is a farmer and grazier in Northamptonshire, had eighteen sheep stolen from his grounds there. On the 6th of July 1787 the defendant, who is a grazier in Middlesex, bought the 18 sheep in Smithfield market of a Mr. Parrott a salesman, at a fair price. On the 17th July 1787 the plaintiff gave the defendant notice that the sheep, which he then found in the defendant's possession, had been stolen from him, and he demanded them of the defendant, who refused to deliver them up. A person of the name of Bateman, who stole the sheep, was apprehended on the 17th July 1787, the commission day of the Summer assizes in that year at Northampton; and the justice who committed him bound the plaintiff to prosecute generally at the next assizes; but the plaintiff did not at that assizes prefer his indictment, and the felon was then discharged by proclamation. In February 1788 the man, who was so discharged by proclamation at the Summer Assizes 1787, was again apprehended, and at the Lent Assizes 1788 the plaintiff prosecuted and capitally convicted him at Northampton, where he was afterwards executed for the offence, of which the plaintiff convicted him. In November 1787 the defendant sold the sheep, which were of the value of 18 l. because they did not thrive. The defendant had notice of the conviction of Bateman on the plaintiff's prosecution before the action brought.

Milles



*Miles*, for the plaintiff, rested his argument on three propositions; 1st, That the plaintiff was entitled to restitution either in specie or in value. 2dly, That the defendant was responsible to him. And 3dly, That this was the proper form of action, under all the circumstances of the case. First, the plaintiff's claim to restitution is founded upon the 21 H. 8. c. 11. which directs that goods stolen shall be restored to the owner upon certain conditions, namely, that he shall give, or procure, evidence against the felon, and that the felon be prosecuted to conviction thereon. Upon performance of these, the right of the owner, which was before suspended, becomes perfect and absolute; now both these conditions were satisfied in this instance. The only objection which can be raised is, that fresh suit is as necessary to be enquired into, and shewn, under the statute as at common law; but there is a great difference between the two cases. In the latter it was always an object of enquiry, and till found, it is doubted by most authors whether the appellant could have had restitution: but under the statute it does not appear that this Court have any discretion to enquire into fresh suit; nor could the jury have done so at the trial. The words of the statute are decisive upon this head, which declares that the owner, on proof of the abovementioned conditions, shall be restored to his goods: this is a substantive clause; and as to the directions for issuing the writ of restitution, that is only as to the manner of regaining possession, which is to be in like manner as though the felon had been convicted at the suit of the party on appeal. 2 *Inst.* 714. is in point, where Lord *Coke*, enumerating the exceptions to the general rule, that a sale in market overt shall be binding upon the goods sold, mentions the instance in question, as it was at common law; where, if the king's officer had seized goods from a felon, and afterwards sold them in market overt before the felon were convicted, yet if the owner made fresh suit, and prosecuted the felon to conviction, the king should make him restitution of the goods. And then speaking of the 21 H. 8. c. 11. in the same clause, he adds in the margin, "Note these absolute words for restitution, upon the evidence given, upon this act, there needeth no fresh suit to be enquired of, as we know by experience." 1 *Hale P. C.* 544. Neither can it be objected, that the felon was discharged by proclamation at the first assizes after he had been taken; for that was only a temporary release, and no final discharge. It might

1788.

HORWOOD  
against  
SMITH.



1788.

HORWOOD  
against  
SMITH.

happen from various circumstances, over which the prosecutor had no control; as, in the present case, where the felon was apprehended after the grand jury were discharged. However, if the Court have no discretion, it is immaterial to consider this point; and it appears clearly that there is no limitation fixed by the statute to the conviction; nor can the Court at any time refuse the writ of restitution on that account. Indeed it often happens that the grand jury reject a bill, where, under the circumstances, it is probable that sufficient evidence cannot be procured at that time. But even supposing that fresh suit were inquirable into, yet as at common law if ordinary diligence were used, and the offender were prosecuted within a year and a day, the party would have been entitled to restitution according to 1 *Hale P. C.* 545. *b.* the same answer may be given in the present case. But it is enough to say, that the words of the statute are directory, and allow no latitude of discretion as to issuing the writ of restitution after the felon is convicted by the party: and the construction upon this statute has always been large and liberal, as being highly beneficial to the public, and conducive to the security of personal property; according to which, executors and administrators have been held to be included, though not named in it. *Bendl.* 87. 6 *Co.* 80. 3 *Inst.* 242. is to the same effect; and there Lord *Coke* adds, for a reason, that it is a beneficial law, and giveth a more speedy remedy to the party robbed than the common law gave by way of appeal, and therefore ought to be construed beneficially. If the defendant were liable to make restitution of the goods, provided they had remained in his possession, there is no objection to the recovering in value. *Harberrie's* case cited in *Cro. Eliz.* 661. *Harris's* case, *Noy* 128. where money, the produce of the goods sold, was restored, after conviction, to the owner, although by the words of the statute the goods &c. are to be restored. *Dodderidge*, J. in 2 *Bulst.* 210, says, the same had been so held. And *Rolle*, Ch. J. was of the same opinion in *Styles*, 347. 4 *Blac. Com.* 362. and *Golightly v. Reynolds.* 12 *G.* 3. are in point. Secondly, The defendant had never any property in these goods as against the plaintiff, nor the legal power of disposing of them either before or after notice of the robbery and the identity of the property. The property was never absolutely divested from the plaintiff for a moment by the sale in market overt, either by common law, or since the statute, in the event which took place. 2 *Inst.* 714. 1 *Hal. P. C.* 543. 2 *Blac. Com.* 449. *Burgefs v. Coney*,



*Coney, Trem. P. C. 314. Kel. 48. 1 Hawk. P. C. 248. §. 49.* last edition. If the property never were divested, the defendant could have no right over it. Every person, who buys goods in market overt, makes his purchase subject to the laws of market overt. Amongst others the purchase must be subject to the possibility of the goods having been stolen, and the legal consequences thereof. And the reason given by Lord Coke and Mr. Justice Blackstone is a sound one; a person even in market overt may or may not buy; it is a matter of election, and although he may be an innocent purchaser, yet *ante omnia spoliatus debet restitui*. In the first instance the owner incurred not the loss by any act of his own, and it is for the benefit of the public that he should be encouraged to bring the offender to justice. Before sale in market overt the plaintiff might have seized these goods any where, unless they had been waived. *Foxley's case. 5 Co. 109.* But though afterwards the plaintiff's right of seizure or of action was thereby suspended, yet all the books agree that the property was not altered by the sale as against the owner, whatever might have been the question between a subsequent purchaser and the defendant: but the notice concluded the property in the hands of the defendant. After that, he became a bailee of the property subject to the consequence of the conviction by the plaintiff's evidence; and nothing but the death or acquittal of the felon could make it indefeasible in his hands. He undertook the subsequent sale at his peril, and is liable for the value to the owner. If he had kept the sheep, they might have been recovered from him, and his wrongful act in selling them with notice of the property will not put him in a better situation. If it were otherwise, the provisions of the statute would be rendered nugatory; for nothing could be more easy than to evade restitution by shifting the property from one to another. This appears to be very much like the case put by Lord Coke in *Isaac v. Clerk (a)*, who says, It hath been said that when a man finds goods and dispossesses himself thereof, by this he shall be discharged; but this is not so, as appears by 12 E. 4. 13. for he is bound to answer to the owner: and if he deliver them to any one who is not the right owner, he shall be charged for them; for at first it is in his election, whether he will take them or not. And he adds afterwards that, if he sell or destroy the goods, of course it is a conversion. So of a purchaser in market overt, whom the notice in this case

1788.

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HORWOOD  
against  
SMITH.

(a) 2 Eulfr. 312.



1788.

HORWOOD  
against  
SMITH.

puts in the same condition as the finder of goods in the case put by Lord Coke. The fact of notice in this case is very material, as in *Cooper v. Chitty* (a), where a sale, by the sheriff, of a person's goods after notice of his bankruptcy, was held a wrongful conversion, although the possession had been innocently and lawfully taken. The plaintiff having fixed one person with notice, who then held the goods in his hands, it was not necessary for him to follow the goods through all the subsequent holders; he has no means of doing it; and if that were necessary the statute might be rendered nugatory; and the case of *Golightly* and *Reynolds* is in point to shew that it is not required. No relation is necessary in this case to make the defendant liable, for it is not the prosecution which gives the party his title to the goods, but the prior ownership; it only gives him the remedy. As in the case of an executor to whom the probate gives a right to sue, but his title to the property of the testator arises from the will; and he has a constructive possession before the probate (b). Thirdly, It being shewn that the defendant is liable to the plaintiff, this is the proper form of action. In addition to several of the authorities before cited, it is to be observed that the statute does not take away the common law right of action, which accrued after appeal, but it only gives an additional and more expeditious remedy by writ of restitution. That indeed has fallen into disuse, but it never was doubted but that an action lay to recover the property. Here the tort is clear in the defendant. There are only two requisites necessary in trover, the one to prove the property in question in the plaintiff; the other to shew the wrongful conversion in the defendant: the first was, without doubt, established; and as to the other, the sale or destruction of the subject matter is sufficient evidence of a conversion, without shewing a demand and refusal. He also cited *Dawkes v. Coveleigh*, Sty. 346. *Markham v. Cobbe*, Noy 82. and *Golightly v. Reynolds*, 12 G. 3.

*Russell*, for the defendant, admitted that the plaintiff was entitled to restitution of his sheep, though they had been sold in market overt; but contended that his remedy was against that person only who had them in possession at the time of the conviction of the thief or afterwards. From the time they were stolen to the time of conviction, they may have been the property of fifty different persons, against any of whom such an action may be maintained, if the present be well founded: for

(a) 1 Burr. 20.

(b) 1 vol. 480.



as to the notice it cannot make any difference, for at the time the plaintiff gave notice, he had no property in the sheep, nor was the defendant bound to deliver them to him. He was then stopped by the Court.

1788.

HORWOOD  
against  
SMITH.

LORD KENYON, Ch. J.—There is no doubt but that the original owner of these goods, who prosecuted the felon to conviction, has a right to a restitution of them. But the question here is, whether he can maintain this action of trover against the defendant, who was not in possession of them at the time of the attainder; and we are of opinion that he cannot. To maintain this action the defendant should have been in possession when the attainder happened. But if he could maintain the present action, he may recover with equal propriety against any one of the various persons through whose hands the goods may have passed in the intermediate time. Now it cannot be conceived that he should have his remedy against so many; there must be some person to answer him to the extent of his demand. The statute has directed that in certain circumstances there shall be a restitution of the goods. But during the interval between the felony and the conviction, the property remains *in dubio*, liable to be defeated by the attainder: now during that time the defendant purchased the goods in question for a valuable consideration. If in this case the goods had remained in the defendant's possession at the time of the attainder, that would have altered the case. But he had the good fortune to get rid of them before that time, and another person was then substituted in his room. There is no case in which it has been held that this action can be maintained against a person in this defendant's situation. The plaintiff has a right to restitution of the goods in specie, and perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction and refuses to deliver them; for then the goods are converted to the prejudice of the owner.

ASHHURST, J.—There would have been no doubt in this case that the plaintiff could not recover, if it had not been for the circumstance of the notice given to the defendant relative to the felony: but that does not alter the law. For there would be great hardship in determining that, notwithstanding the notice, the defendant should have been obliged to keep possession of the goods, when it was doubtful whether the felon would or would not be attainted. The property may perhaps



1788.

HORWOOD  
against  
SMITH.

be of a perishable nature; and in this case the keeping of the sheep would have been attended with a considerable expence. Therefore I think the defendant was not bound to keep *them*.

BULLER, J.—I lay the notice, which was given to the defendant, totally out of my consideration; for it could have no effect at that time. The plaintiff could not demand the goods of the defendant, merely because they had been stolen from him; for it was not then certain that the felony would be followed by a conviction of the offender. This is an action of trover for sheep; and in order to maintain it the plaintiff must prove that the sheep were his property, and that while they were so they came into the defendant's possession, who converted them to his use. Now when did the plaintiff's property begin in this case? Not till after the conviction of the felon; because before that time the property had been altered by a sale in market overt. From the time of the conviction the defendant has never had the possession of the sheep: then it cannot be said that he converted the plaintiff's sheep to his use, having parted with them before the time when the property was re-vested in the plaintiff.

GROSE, J.—If this action could be maintained, it would defeat the object of the act of parliament which entitles the owner of stolen goods, prosecuting to conviction, to a restitution of them. For if third persons, in whose possession goods which had been stolen came fairly and for a valuable consideration, were compelled to deliver them up before a conviction of the felon, it would take away the incitement to the prosecutor to convict the felon, which it was the intention of the legislature to give. Therefore on this ground, as well as for the reasons given by the Court, I am of opinion that this action cannot be maintained.

*Postea* to the defendant,

Tuesday,  
Nov. 25th.

COLLINS *against* POWELL.

Where a  
cause, in  
which the  
defendant  
has been

holden to bail is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10*l.*, the defendant may be holden to bail again in an action upon the award.

**T**HE defendant was originally held to bail for 11*l.* On the trial the cause was referred, and the arbitrator awarded 11*l.* to be paid by the defendant to the plaintiff, with 3*l.* for

costs,



costs, for which he was again held to bail. Whereupon he obtained a rule on a former day to shew cause why the bail bond should not be delivered up to be cancelled, and why he should not be at liberty to file common bail, on the ground that he could not be arrested twice for the same sum; and this was likened to an action on a judgment, in which the defendant cannot be held to bail, if he has been arrested in the original action. After cause shewn this day,

The Court were of opinion that neither justice or expediency required that the rule should be made absolute. This objection can only arise by assimilating this to an action brought on a former judgment, where the same defendant has been held to bail for the same sum: but, in answer, it is sufficient to say that this is not like that case. That is an exception to the general rule, and the reason of it does not extend to the present case. Actions which are brought on judgments recovered, are generally litigious, and therefore are not considered in a favorable light in courts of justice. But this is the common case where a debt is sworn to be due which entitles the party to hold the defendant to bail. For the reference put an end to the first action, and a new cause of action arose by the arbitration. This application is perfectly new; it has never been attempted before; and it ought now to be rejected.

Rule discharged.

Gibbs in support of the rule. *Erskine* and *R. Morris* against it.

### W E B B *against* H A R V E Y and Another.

THIS was a rule to shew cause why the proceedings on the *scire facias* should not be set aside for irregularity. And the question was whether the defendants, as bail, had surrendered their principal in time. The *scire facias* was returnable on the 14th November; but the defendants did not surrender their principal till the evening of that day after the rising of the Court, when it was done at one of the Judge's Chambers. The bail were not summoned till an hour before the rising of the Court; but the sheriff returned *scire feci*. In answer to this application to set aside the proceedings it was insisted that,

from shewing that they were summoned so late on the return day that they could not bring in their principal before the rising of the Court.

The Court set aside proceedings in *scire facias* against bail because they were summoned only an hour before the Court rose on the return day. The sheriff's return of *scire feci* does not stop the bail in their princi-

according



1788.

WEBB  
against  
HARVEY.

according to the uniform practice of the Court, the surrender was too late. And with respect to the other objection, that the bail were not summoned in time, it was said that as the sheriff had made his return of *scire feci*, the Court ought not to enquire into the time when they were summoned, but they might bring an action against the sheriff if the return were false. *Hunt v. Cox.* 1 Bl. Rep. 394. 3 Burr. 1360. But

The Court, on the authority of *Pool v. Wills* (a) which was read from the Master's note book, made the rule absolute. And they observed that summoning the bail only an hour before the rising of the Court could not answer any purpose. However, as no exoneretur was entered on the bail piece, nor render of the principal entered on the Marshal's books,

The Rule was made absolute on payment of costs. Baldwin in support of the rule. Wood against it.

(a) *Pool v. Wills*, E. 16 Geo. 3. B. R. A rule having been obtained to shew cause why the proceedings against the bail should not be set aside for irregularity; which irregularity was that the sheriff had not summoned the party on the *scire facias* in due time, he having summoned them on the return day of the *scire facias* after the rising of the Court; Wallace shewed cause, and contended that

the Court were bound by the sheriff's return, who had returned a *scire feci* on the writ; for which was cited the case of *Barr v. Satchwell*. 2 Str. 813. Where the Court said they would not enter into the truth of the return. But notwithstanding what was said in that case,

The Court made the rule absolute for setting aside the proceedings.

Tuesday,  
Nov. 25th.

## SELBY against ROBINSON.

A custom for poor and indigent householders living in A. to cut and carry away rotten boughs and branches in a chase in A. cannot be supported; the description of the persons entitled being too vague. Therefore where the defendant justified in trespass under such a custom, which was found for him, the Court set aside the verdict on that issue, and entered a verdict for the plaintiff with nominal damages.

TRESPASS for breaking and entering the plaintiff's closes, one called *Broadway Coppice*, and the other *Codemore Coppice*, in *Whaddon, Bucks*, and cutting down boughs, wood, and underwood, and carrying away the same. The defendant justified under the following custom; that all and every the poor, necessitous, and indigent, householder, and householders, residing and abiding within the said township of *Whaddon*, in the parish of *Whaddon*, and county aforesaid, from time immemorial, have used and been accustomed, at his and their free will and pleasure, standing upon the ground within the said chase [the closes described in the declaration] as well with their hands as with woodhooks, to break off, gather, pick up, take,

and



and carry away from and out of *Whaddon Chase* aforesaid as well the rotten wood of and belonging to the boughs and branches of the trees, standing, and growing, in the said chase, as the rotten wood broken and fallen off from the boughs and branches of the said trees there standing and growing, and found upon the ground within the said chase, for necessary fuel to be used, burned, and consumed, in his and their respective dwelling houses in the township of *Whaddon* aforesaid. This custom was traversed by the replication, and found for the defendant. There were two other justifications, both of which were found for the plaintiff.

*Le Blanc*, Serjt. obtained a rule to shew cause why the verdict on the issue taken on the above custom should not be set aside, and a verdict entered for the plaintiff on that issue with nominal damages (a), on the ground that the custom, on which the justification was founded, was bad in point of law; on the authority of *Gateward's case*. 6 Co. 59. b.

*Partridge* and *Adair* were now proceeding to shew cause, and to distinguish this from *Gateward's case*, because the claim there set up was by the inhabitants of another parish, whereas this is confined to householders within the same township; and the case of *Beau v. Bloom* was cited. Another distinction was also taken between *Gateward's case* and this; that was on demurrer, and this application is after verdict, when every thing necessary to ascertain the custom must be presumed to have been proved. *Crowther v. Oldfield*, *Salk.* 3. But

The Court thought the question too clear for discussion; and said it was impossible to support the custom as now set out. It might perhaps have been otherwise, if the defendant could have stated on the record that he was seised of a certain ancient tenement, and so prescribed in a *que estate*; because that would be limiting the benefit claimed to the houses to which the prescription would apply. But there is no limitation at all in this case; and it is impossible to ascertain who is entitled to this right under the custom as stated on this record; for the description of *poor householders* is too vague and uncertain.

Rule absolute.

(a) *Vid. Crown v. Hanley, Barn.* 255.

1788.

SERJANT  
against  
ROBINSON.



1788.

Wednesday  
Nov. 26th.

A letter written by a defendant (who pleaded the statute of limitations) to the plaintiff's attorney on being served with a writ, couched in ambiguous terms neither expressly admitting or denying the debt, should be left to the jury to consider whether it amounts to an acknowledgment of the debt, so as to take it out of the statute of limitations.

## LLOYD against MAUND.

**A**SSUMPSIT for work and labor by the plaintiff as an attorney. Pleas, the general issue, and the statute of limitations. At the trial at the last *Hereford* Assizes, before Lord KENYON, the plaintiff produced the following letter written to his attorney by the defendant in *January* 1788, in order to take this case out of the statute of limitations; "I have lately been served by Mr. *Meredith Price* with a writ *at the suit of one Lloyd*. I am at a loss to know whether was it your orders, or was it some other of the same name. For several reasons I cannot suppose that an old particular friend would ever be guilty of causing an action to be commenced, without first advising him on it. I believe that you have had no cause to contradict my saying, that I always served you on all occasions that ever lay in my power; therefore I flatter myself that you have no concern in this business. However if it should appear to the contrary, I must beg leave to inform you that before I will pay any cost more than defending, will absolutely take house in the liberty of *Carmarthen* (a), which I am fully satisfied will answer my expectations in business much better than here at *Landover*. As to Mr. P.'s views, I am no stranger at all to and see through them without a spectacle; and as to your part, cannot expect to reap any benefit from that quarter, as he says you are indebted to him to the amount of 700 l. Therefore if you seriously consider your own interest, you cannot be any gainer by endeavouring to injure a man who has always been your friend. However you are to act as you think proper. As in respect to matters between you and me, will be rectified, when I can settle my affairs, which I believe will now soon be. Mr. *Rice Davies* of *Swansea* has received positive orders from Mr. *R. Price* and son to sell the *Erwastod* and *Combdu* estates, and will be advertised soon; I cannot believe that they will be sufficient to discharge the mortgage and Mr. *Davis's* demand, which amounts in cash lent and business done to 1000 l." But the learned Judge, being of opinion that this did not amount to a promise, or acknowledgment of the debt, so as to take it out of the statute of limitations, nonsuited the plaintiff.

(a) Which means in that part of the country going to *Carmarthen* gaol.



A rule having been obtained to shew cause why the nonsuit should not be set aside and a new trial granted,

1788.

*Bower* now shewed cause. None of the expressions used in the defendant's letter amount to an acknowledgment of any existing debt. By that it does not appear that the defendant even knew who was the real plaintiff; for he speaks of *one Lloyd*, and wishes to be informed whether the plaintiff was that person; and then he proceeds to state reasons why he did not conceive it was the plaintiff. So far from his acknowledging the existence of the debt, he even seeks for information as to the cause of action. And no argument can be drawn from that part of the letter relative to the costs, as if the defendant had said that though he was willing to pay the debt, he would not pay the costs; because he persists in defending the action, which is a disavowal of the debt.

LLOYD  
against  
MAUND.

*Bearcroft* and *Williams*, in support of the rule, stated the principle to be, that the slightest acknowledgment by the defendant that the debt remains unpaid defeats the statute of limitations. Then the question is, whether this letter should not have been left to the jury, in order that they might exercise their discretion upon it, and say whether it did or did not amount to an acknowledgment of the debt. As to which, it is material to observe that, from the beginning to the end of the letter, which was written on the subject of the plaintiff's demand, the defendant does not in any part of it deny the debt. He first complains that the action is brought against him without previously apprising him of it; but if nothing had been due, he would have said at once that the demand was not founded in justice. Again too he says "before I will pay any costs more than defending, will absolutely take house in the liberty of *Carden*;" which amounts to an acquiescence in the demand, and a defiance to the plaintiff to obtain payment of it. And the latter expression "as in respect to matters between you and me will be rectified when I can settle my affairs," is conclusive. In cases of this sort the least acknowledgment of the debt has been held sufficient; as in a case before Lord *Mansfield*, where on the plaintiff's attorney saying, that his client had a claim on the defendant, the latter answered "If he has any demand on me, it shall be settled." Now that is much stronger than the present, "as to matters between you and me, &c.:" for the one supposes the existence of the debt, whereas the other denies it.

Lord



1788.

LLOYD  
against  
MAUND.

Lord KENYON, Ch. J. having tried the cause, declined giving any opinion upon the question.

ASHHURST, J.—The only doubt in my mind is whether the letter should not have been left to the jury for them to form their opinion upon it. For it is certainly true that any acknowledgment will take the case out of the statute of limitations. Now though this letter is written in ambiguous terms, there are some parts of it, from which the jury might perhaps have inferred an acknowledgment of the debt. Throughout the whole of it the defendant does not deny the existence of the debt. He begins with reproaching the plaintiff for not giving him some information of his intention to bring an action against him; and then he says in substance “that sooner than pay the costs, he will go to gaol:” And in another part he adds, “As to the affair between you and me, it will be rectified soon.” That perhaps does contain an insinuation that something was due. And I think the jury should have put their construction on it.

BULLER, J.—It has been held that the slightest acknowledgment will take the case out of the statute of limitations; as where the defendant said, “I am ready to account, but nothing is due to you (a).” The defendant in his letter affects not even to know at whose suit the action was commenced; but it is evident that it is merely a pretence. The whole of it is a begging letter, and it is evidently intended to gain time; and I am of opinion that it should have been left to the jury.

GROSE, J.—This letter seems to me to be rather more than a begging letter. For it was intended to deter the plaintiff from going on with his suit, by threatening him that though he should succeed in the action he should gain nothing by it. Now if nothing were really due at this time, the attempt to hinder the plaintiff from proceeding in the action would be absurd. Therefore I think this letter is exceedingly strong from which to infer an acknowledgment of the debt.

Rule absolute.

(a) *Cowp.* 548.

COCKSHOTT



1788.

Cockshott and Another *against* BENNETT and Another.

Tuesday,  
Nov. 25th.

**T**HIS was an action of *assumpsit* on a promissory note given by the defendants to the plaintiffs, tried at the last *Lancaster* Assizes, before *Thomson*, B. when a verdict was found for the defendants. The circumstances of the case were these; the defendants being considerably indebted to the plaintiffs, and to several other creditors, and being insolvent, assigned over all their effects in trust to pay 11s. in the pound to their creditors, to which they all consented and signed the deed, except the plaintiffs, who, as their demand accrued just before the failure, refused to sign the deed, and to take any composition unless the defendants would give them a note for the remaining 9s. in the pound; they accordingly gave them the note in question to that amount, on which the plaintiffs signed the deed, and the defendants made a subsequent promise to pay it. It also appeared that the rest of the creditors would not have signed the deed, unless the plaintiffs did so likewise.

A rule having been obtained to shew cause why a new trial should not be granted,

The *Solicitor General* was now proceeding to shew cause; but the Court desired the counsel in support of the rule to begin.

*Law* in support of the rule for a new trial. First, supposing the rule now settled in a court of equity, that creditors signing a composition deed with the rest of the creditors shall be restrained by injunction from suing at law upon securities obtained from the bankrupt for the unsatisfied surplus of their debts, it does not follow that such a debt is not recoverable in a court of law. 2dly, Subsequent acts of confirmation have been held, both at law and equity, sufficient to entitle a party to sue without any new consideration. As to the first, although it has been the practice of late years in a court of equity to grant injunctions to stay suits brought in the courts of law on securities given by insolvent persons, to secure to particular creditors a payment beyond the common dividend, yet all the authorities previous to the statute 5 Geo. 2. c. 30. s. 22. shew that in such cases a court of equity would not interfere. *Small v. Brackley*. 2 Vern. 602.

If all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand by refusing to execute till such note be made, the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action.

9 K. In



1788.

COCKSHOTT  
against  
BENNETT.

In *Lewis v. Chase* (a), on the defendant's petitioning against the allowance of the plaintiff's certificate (who had become a bankrupt) the plaintiff gave him a bond for payment of his whole debt, in consideration of withdrawing his petition; and on the defendant's obtaining a verdict at law on the bond, the plaintiff brought a bill in Chancery to be relieved against it, which was dismissed by Lord Chancellor *Macclesfield*. The next case on this subject is that of *Spurrett v. Spiller* (b), which is the first case after the statute where an injunction was granted, the Lord Chancellor being of opinion that it was a very proper case to be considered. But the ground on which a court of equity interferes in these cases is decisive to shew that a court of law cannot vacate the contract; for a court of equity interferes upon terms, and may give a partial relief; but a court of law cannot try all the equitable circumstances of the case. The Court of Chancery also has a jurisdiction from the bankrupt laws: but there is no analogy between cases on the bankrupt laws and the present. A security given by a bankrupt to obtain his certificate is vacated by the statute 5 Geo. 2. The bankrupt laws are compulsory, and the object of them is an equal distribution among the creditors, and the discharge of the bankrupt on giving up all his effects. But a composition agreement with creditors has for its object only an equal partition of all the insolvent's effects among the creditors: but the future liberty of the person of the insolvent is no part of the object of their agreement. And this case is different from that of *Spurrett v. Spiller*, and the case put by Lord *Hardwicke* in *Lord Chesterfield v. Janssen* (c); for in those cases a precise dividend was to be made; and the Court of Chancery interfered on the ground that it was a fraud on the other creditors, who might otherwise have obtained a larger dividend: but in this case in as much as the whole fund was assigned, the creditors could not possibly be prejudiced by the security given to the plaintiffs. But, secondly, Even if this were fraudulent as against the rest of the creditors, yet it was not so as against the defendants; for there was a good consideration for the promise in law. There was a preceding debt, which was revived by the subsequent promise. In *Trueman v. Fenton* (d) it was held that a note given by a bankrupt after his bankruptcy for a debt due before was valid. That was determined on the ground that the old debt due in conscience, though not in law,

(a) 1 P. Wms. 620.

(b) 1 Atk. 105.

(c) 1 Atk. 352.

(d) Cowp. 544.

was



was a good consideration for a promise. Then as the Court in that case gave effect to the promise, there is no reason why the former debt should not be a valid consideration for the subsequent promise which was made in this case.

1788.

COCKSHOTT  
against  
BENNETT.

LORD KENYON, Ch. J.—In determining this case, I wish to disclaim founding my opinion upon grounds of equity as contradistinguished from grounds of law. The foundation of my opinion is, that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in consideration of receiving a composition. The note preceded the execution of the deed; all the creditors being assembled for the purpose of arranging the defendant's affairs, they all undertook and mutually contracted with each other that the defendants should be discharged from their debts after the execution of the deed. Then these plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put in that situation which was the inducement to the other creditors to sign the deed, and to relinquish a part of their demands. If a bankrupt, or an insolvent, after becoming free from his engagements, having no restraint on his mind, voluntarily give security for a former demand, which is only due in conscience, such a security may be enforced in a court of law. But the contract in the present case affected all the other creditors, by rendering abortive all that they had intended to do for the bankrupt, in compounding for their debts. It has been said that the court of Chancery has interfered in these cases on equitable principles, and that some of the cases are one way and some another. But I do not know that Lord *Hardwicke* (in *Lord Chesterfield v. Janssen*) would have been of a different opinion in a court of law. And during the time that I was in a court of equity, the decisions on this subject were uniform; and in these sort of cases the Court ordered the securities to be delivered up. Then as to the revival of this debt by a subsequent promise, contracts not founded on immoral considerations may be revived, though before there was no legal remedy. But this transaction is bottomed in fraud, which is a species of immorality; and, not being available as such, cannot be revived by a subsequent promise.

ASHHURST, J.—If this security be fraudulent, a court of law may avoid it as well as a court of equity; and in my apprehension, it is a fraud on the rest of the creditors. For they were induced



1788.

COCKSHOTT  
against  
BENNETT.

induced to enter into this agreement on principles of humanity, in order to discharge the defendants from their incumbrances: and if they had not thought that such would have been the effect, they would not probably have agreed to sign the deed, but each would have endeavoured to obtain payment of his whole debt. Therefore, I think that this security is not merely voidable, but absolutely void. If it had been only voidable, the subsequent promise might have revived it: but if void in its creation, no promise could set it up again. But here the note was void on the ground of fraud; and any subsequent promise must be a *nudum pactum*: For the debt was annihilated by the deed of composition; and the plaintiffs had consented to take a smaller sum than their original debt. This is not like a security given by an infant, which is only voidable; for that may be revived by a promise after he comes of age. In such case he is bound in equity and in conscience to discharge the debt, though the law would not compel him to do so: but he may wave the privilege of infancy, which the law gives him for the purpose of securing him against the impositions of designing persons. And if he choose to wave his privilege, the subsequent promise will operate upon the preceding consideration.

BULLER, J.—The case of *Smith Bromley* (a) (in which that of *Lewis v. Chace* is shaken) goes the full length of deciding this question. Here the defendants were absolutely in the power of the plaintiffs at the time when this note was given; they took an undue advantage of the distressed situation of the defendants. If this note had been obtained by actual compulsion, there is no doubt but that it would be void; now this is equivalent to it. Then if the security were void at its creation, no subsequent promise can set it up; for it must be recollected, that the promise, which is relied on, is to revive the note. This not like the case of *Trueman v. Fenton*, where the party was a free man, and acted without compulsion, after his bankruptcy.

GROSE, J.—of the same opinion.

Rule discharged.

(a) *Dougl. 2d. ed. 671. n.*



1788.

The KING *against* BOND.Thursday  
Nov. 27th.

A Rule had been obtained by *Le Blanc*, Serjeant, to shew cause why an information in the nature of a *quo warranto* should not be exhibited against the defendant to shew by what authority he claims to be a free burgess of the borough of *Cambridge*. This is an ancient borough incorporated by the name of the mayor, bailiffs, and burgesses of *Cambridge*, and consists of a mayor, 12 aldermen, and 24 common councilmen. In 1766 a bye-law was made that in future no person should be made an honorary freeman, except the mayor's honorary freemen, unless he should be first proposed by the mayor, bailiffs, and burgesses, on *one* grand common day, and approved of by the majority then present, and should not be sworn a free burgess unless confirmed at the *next* grand common day by the mayor bailiffs and burgesses or the major part then present. In 1776 the defendant was elected an honorary freeman of the borough, on payment of 20 *l.* and was sworn in on the *same* grand common day. It further appeared that in 1777 the defendant was elected a common councilman, and served the office of mayor in 1779, and again in 1783. In the years 1784 and 1785 similar informations to the present had been exhibited against the defendant and other freemen, on the same account of the irregularity of their first election, which were afterwards abandoned. Upon which another bye-law was made on 12th *April* 1785, stating that, as doubts had arisen respecting the validity of the bye-law of 1766, to obviate and prevent any such doubts in future, and to put an end to all suits concerning the same, it was declared that that bye-law and every part thereof was null and void, and that it be expunged and made void from the common day book: and it was further ordered that the freedom of all and every such person and persons not having resigned should be and was thereby confirmed and declared to be good and effectual to all intents and purposes; and that the suits instituted against such freemen should be defended at the expence of the corporation. The constitution of the corporation appeared further to be that before a person is competent to serve the office of mayor he must have been elected a free burgess, and then he must pass offices before he is eligible to the office of common councilman,

No possession of a corporate franchise for less than 20 years is of itself a sufficient objection to an information in nature of a *quo warranto* to try the validity of the title to such franchise. But the circumstance of the relator's standing in the same situation as the defendant, or it's appearing that the corporation must necessarily be dissolved by impeaching the defendant's title, and those who claim under him, will govern the discretion of the court in refusing such an application. The fact of the defendant's title having been before attacked by a similar information, which was afterwards abandoned, has no weight.



1788.

The KING  
against  
BOND.

which latter fill up the vacancies among the aldermen, and from the body of aldermen the mayor is annually chosen. And it was deposed by the defendant that if he should be adjudged to have been ineligible at the time that he filled the office of mayor, the franchises of six aldermen, 11 common councilmen, and above 100 freemen of the corporation would be thereby destroyed: and if all these should be ousted, he conceived that the corporation would be in danger of being dissolved. [But in answer to a question from the Court in the course of the argument, the defendant's counsel admitted that elections might still be made notwithstanding these persons should be ousted]. The defendant further deposed that *Hawes*, one of the persons applying for this information, was sworn in the very day on which he was elected, in the same manner that the deponent had been.

*Law* and *Wilson* shewed cause against the rule, by observing that the Court had in many instances departed from the general rule of limitation respecting the granting of informations in the nature of *quo warranto* if applied for within 20 years, where circumstances have appeared which have induced them in their discretion to narrow it. In the very inception of that rule, in the *Winchelsea* causes (a), it was said by the Court that length of time, though within 20 years, might weigh as presumptive evidence, or as one circumstance joined to others, to shew the impropriety of granting an information. And that was again recognized in *The King v. Stacy* (b), where Lord *Mansfield* said, that within 20 years there might be other circumstances to warrant the Court in saying that a prosecutor of an information should not make use of the king's name for such and such purposes. And in a case there quoted of *The King v. Pyke and Braddock*, T. 20 Geo. 2. an information was refused after quiet possession for 14 years alone. Now the present defendant was elected so long ago as the year 1776, and the Court in forming their judgment upon the propriety of granting or refusing an information will pay some regard to the length of time which has elapsed since his election. The bye-law of 1766, upon which the question arises, has been expunged and declared null and void by the subsequent bye-law, and the rights of all those persons whose freedom was affected by it confirmed by a subsequent act of the corporation. But besides, there are several material reasons why the Court should refuse their interference in this case, which

(a) 4 Burr. 1963, and 2121. (b) *Ante*, 1 vol. 3.

have



have been suffered to weigh in other cases. It is stated that the franchises of above 100 freemen, and of other principal officers of the corporation, depend upon the validity of the defendant's election; and indeed all the corporate acts done since he was first elected mayor will be null and void, if it should appear that he was illegally chosen. And if the existence of the corporation is only endangered thereby, that will be a very sufficient reason for refusing the information. In the cases of *Rex v. Stacy*, and *Rex v. Binfield* (a), that is assigned as a reason for rejecting an application of this sort: and it was particularly relied upon in the case of *The King v. Dawes* (b). Another ground for denying this information arises from the situation of one of the relators, the validity of whose election stands exactly upon the same footing as that of the defendants. This was also a principal objection relied on by the Court in *The King v. Master*, namely, that the persons who applied for the information in that case were participators of the guilt, if any, of the person complained of. And when the first information was moved for against *Stacy*, the application was dismissed by the Court, because the relators had concurred in the election at the time. It is also observable that the informations which had been before exhibited against the defendant and other persons in the years 1784 and 1785 were abandoned, which shewed an acquiescence in their title at that time, and is an additional reason for the Court's refusing now to lend their assistance to find a defect in it.

*Le Blanc*, Serjt. in support of the rule. It plainly appears that there is sufficient ground for the present application, inasmuch as the defendant's election was directly repugnant to the bye-law of 1766, which was in full force at that time. That bye-law was founded in reason and convenience, and was calculated to prevent any surprise upon the body at large of the corporation by some few of the members colluding together to introduce new freemen. That being a subsisting law for elections at the time, no subsequent repeal of it can possibly validate those intermediate elections which were void *ab initio*, by being repugnant to the form prescribed. Then as to the objections which have been raised to the information's being granted under all the circumstances, they are either insufficient in themselves, or are not warranted by the facts. The length of time in this case is clearly not a sufficient bar in itself. The limitation of 20 years

1788.

The KING  
against  
BOND.

(a) *Corup.* 77. (b) 4 *Burr.* 2124.



1788.

The KING  
against  
BOND.

for bringing informations of this sort has been long settled; nor have any of the cases mentioned narrowed the rule so much as is now contended for. And as for the argument which has been drawn from the informations which were exhibited a few years ago having been abandoned; if that circumstance could at all vary this case, it would rather apply the other way; for it negatives the idea of undisturbed possession, which is relied upon in the authorities from whence the argument for the defendant has been drawn: but in truth that circumstance cannot have any weight, otherwise every bad title might be cured by procuring some friend to apply for an information, and afterwards to abandon it. The remaining objections, which are the two principal ones, are answered by appeal to the facts stated. First, it is not sworn that no future election can be made even though all the persons mentioned who derive title from the defendant were to be ousted; all that is sworn by the defendant is that he conceived that the corporation will be in danger of being dissolved; and indeed the fact is otherwise. And lastly, though it appears that *Hawes*, one of the persons now applying for the information, was sworn in on the same grand common day on which he was elected, yet as it is not stated when he was elected, *non constat* but that it was after the repeal of the former bye-law, under which the defendant's election was made.

Lord KENYON, Ch. J.—The ground of the present application is to give the parties an opportunity of trying the legality of the defendant's claim to be a burgess of the borough of *Cambridge*. If there were any other mode by which they could dispute this point, and it depended on the discretion of the Court merely whether they would facilitate the means or not, I should not be ready to lend that assistance in the present case, where the titles of so many persons may ultimately be involved. But as the constitution has not pointed out any other mode of coming at the question within the power of the parties, and as derivative titles have been very frequently affected in this manner, I do not know where the line is to be drawn, or how I can say that the information shall not go in this instance. With respect to the time within which the application is made, if a possession of 12 years shall be deemed sufficient to protect the defendant's title from enquiry, why should not 11 years operate to the same purpose? Thus we shall go on pruning away the time which has been limited in such cases, and I do not see where



where we are to stop. On the other hand, I see great reason for adhering to the limitation of 20 years, which has been solemnly settled, within which period the Court will receive these sort of applications. And great difficulties will arise from narrowing that rule to a shorter time; though I admit that there may be other circumstances which may weigh with the Court in refusing their assistance within that period. If the prosecutor had clearly appeared to have stood in the same situation with the defendant whose title he attacked, that would have had its weight with me; but that does by no means necessarily follow from the manner in which this fact is represented. Or if it had appeared that the corporation would be dissolved in consequence of the loss of so considerable a number of its members, that also would have been a good reason for refusing this application. But here it is admitted that that would not be the case, but that the remaining members might proceed to a new election. Upon the whole, therefore, I am of opinion that the defendant has not laid before the court sufficient grounds to entitle himself to a discharge of the rule for an information.

ASHHURST, J.—I agree entirely with the reasons which have been given by my Lord. This case does not fall within any of the reasons adopted by the Court in former cases for breaking in upon the general rule of 20 years, which is the period fixed for receiving applications of this sort. Here the parties have come considerably within the 20 years; they have come within 12 years, which is a less time than occurs in any case where the Court have refused the information for length of time. And if 12 years shall now be held to be too long a possession for the Court to disturb, it will amount to saying that there shall be no rule at all respecting limitation of time. If then the application has been made in time, nothing is stated to encline the Court in their discretion to refuse the information. It does not appear that the prosecutor stands in the same situation as the defendant. It is stated that he was elected in the same manner, but the time when is not mentioned; so that he may have been elected after the last bye-law in 1785. Again it is not said that the corporation *must* necessarily be dissolved. If these persons should be disfranchised, all that the affidavit amounts to is that in the opinion of the defendant it *may* tend to a dissolution. Then as to the former information's having been abandoned, that cannot make any difference, as the reasons for that

1788.

The KING  
against  
BOND.



1788.

The KING  
against  
BOND.

abandonment do not appear. Indeed the fact, as stated, rather bears the other way, for it shews that the Court had thought it proper to grant those informations.

GROSE, J. (a) concurred.

Rule absolute.

(a) Abf. Buller, J.

Thursday,  
Nov. 27th.

The KING against JOHN HEAVEN.

This court will not grant an information in nature of a *quo warranto* against a corporator for non-residence until he has been removed by the corporation.

THIS was a rule calling on the defendant to shew cause why an information in nature of a *quo warranto* should not be exhibited against him to shew by what authority he claimed to be an alderman of the borough of *Bedford*.

The affidavit, on which the rule was obtained, stated, that the borough of *Bedford* was a borough and corporation by prescription, governed by a mayor, recorder, and an indefinite number of aldermen, two bailiffs, and 13 common council men. By the custom of the borough, every burghers, duly elected to and serving the office of mayor, becomes, at the expiration of that office, an alderman; and by the ancient usage and custom of the borough, the office of alderman can only be held by persons resident within the borough; and every alderman removing from the borough, and no longer continuing to reside therein, thereby vacates his office. The defendant, who had before been a burghers, was duly elected to, and served, the office of mayor from *Michaelmas* 1768, to *Michaelmas* 1769, from which time he exercised the office of alderman; and about 13 years ago he removed from the borough, and has not since resided therein; by which he forfeited his office of alderman. In *January* 1787 he was appointed receiver of certain estates in *Middlesex* under an act of parliament for enlarging certain charitable uses for the poor of *Bedford*; and, by a clause in that act, the receiver is required to reside on the said estates. It also stated that the defendant nevertheless continued to use and exercise the office of alderman, and doth now use and exercise the same.

The defendant in his affidavit denied the usage and custom alleged, that an alderman vacated his office by removing from the borough; and that there never was an instance of a removal on that account. And he stated that since he left the borough he has kept apartments at the house of Mr. *Chapman*, one of the aldermen, for the greater convenience of attending to



to the meetings and business of the borough; that he has regularly attended the principal meetings three or four times every year, and has upon all occasions been ready to attend at the borough when his presence there was necessary. And that the members of the corporation always appeared satisfied with such his attendance and discharge of his duty, and never required him to attend in any other manner.

*Partridge* and *Wigley* shewed cause against the rule. The ground of this application, which is for non-residence within the borough, against the defendant is entirely done away by the case of *The King v. Ponsonby* (a) in *Dom. Proc.* where upon reference to all the judges it was held that non-residence is not a sufficient ground for an information in the nature of a *quo warranto* against a member of a corporation without a previous amotion. And if a proper case were laid before the court to shew that the defendant had been guilty of any neglect or misconduct for which he ought to be amoved, and upon proper application to the corporation they had refused to interfere and do their duty, no doubt but that this court would compel them by *mandamus*, according to what is said in the case of *The King v. St. John's College Cambridge* (b), in which case a *mandamus* went to the head of the college, and the rest of the fellows, and masters, commanding them to amove certain fellows who had not taken the oaths appointed by the 1 *W. & M.* And it is not to be disputed since *The King v. Richardson* (c) but that a power of amotion is necessarily incident to a corporation. The corporation indeed are the best judges of what duties are necessary to be performed to the body by the several members. It does not appear that any particular duty is required from the defendant, which would require his constant attendance; and if the corporation have in no respect been injured by his non-residence, and they are content, there seems to be no reason for the interference of this court in any shape, but certainly not in the present mode. Neither does it make any difference in this case that it is stated to be the constitution of this borough that "non-residence thereby vacates the office of alderman;" for in *Vaughan v. Lewis* (d), which was an action for a false return to a *mandamus* to admit and swear the plaintiff bailiff of the borough of

1788.

The KING  
against  
HEAVEN.

(a) 5 *Bro. P. C.* 287. and *Sayer* 245.(b) 4 *Mod.* 233. *Skin.* 359. *S. C.*(c) 1 *Burr.* 538, 9.(d) *Cartb.* 227.



1788.

The KING  
against  
HEAVEN.

*New Radnor in Wales*, to which the defendant had returned *non fuit electus*; among other things stated there appeared to be a clause in the charter that any officer *in futuro* to be chosen &c. *non diutius remanebit in officio, &c. quam infra burgum prædictum, vel libertatem, et franchesias inde cum totâ familiâ inhabitabit, &c.*, and it appearing that the plaintiff when he was chosen common councilman, out of which the bailiff must be chosen, was a foreigner, it was pretended that his office of common councilman was void by this clause, and so not qualified to be elected bailiff: This matter being reserved for the opinion of Lord Holt, he held that the clause was declaratory of the common law; and that the not inhabiting within the borough was a good cause to amove a member; but that it did not *ipso facto* determine his office without an actual amoval. The plaintiff therefore recovered. There is besides another reason why the Court should not entertain this application, because it does not appear that the party applying is a member of the corporation; and in the *King v. Stacey (a)* the Court refused such an application from persons having no concern with the corporation.

*Wilson* in support of the rule. As to the last objection touching the situation of the party making the application, though not one of the corporation, he is stated to be an inhabitant of the borough, and as such has an interest in the due exercise of the corporate functions, which were bestowed for the benefit of the inhabitants. The ground of the application is that it appears by the custom of this borough that any alderman ceasing to reside therein thereby vacates his office *ipso facto*. Therefore, in as much as it is sworn that he still claims to be an alderman, and still attends some of the meetings, he is now an usurper of those franchises, and this is the proper remedy against such an one. Besides, no *mandamus* lies in this case to fill up the office, if the Court should be of opinion that it is vacated, because the number of aldermen is not limited. It is the duty of every corporator to give his attendance, and non-residence is only an offence as it induces non-attendance; and therefore in all common cases it is necessary to enquire whether the nature of the office be such as to require constant attendance, and the corporation themselves can best judge of the inconveniences

(a) *Ante* 1 vol. 1.



1788.

The King  
again?  
HEAVEN.

arising from non-residence in that respect; for which reason the Court will refer such a complaint to the body at large in the first instance before they will interfere; and that is the ground of the decisions alluded to. But it is undoubtedly competent to the crown in the first instance to impose the condition of residence on the corporators, and to make an express declaration that mere non-residence shall of itself vacate the office. Now the custom stated amounts to such a declaration. In the case of the *King v. Ponsonby* it was only stated that he had not resided in the borough, deducing from thence as a consequence of law that the office was vacated thereby, though it appeared on the pleadings that he had attended corporate meetings. And besides there was nothing in that charter to limit the continuance of the office to the residence of the party. Now here the defendant ceased to reside 13 years ago; and has also accepted an office which compels his constant residence elsewhere. In the case of the *King and Ponsonby*, as reported in *Sayer*, Lord Ch. Just. *Ryder* is made to say that the Court will not intend that corporations will act corruptly; and therefore they will grant a *mandamus* to them in such cases to amove the party or examine the charge. But that could scarcely be expected to produce much effect in a case where it appears that notwithstanding an absence of so many years the corporation have taken no steps to remove the defendant, and still continue to summon him regularly to their meetings. But suppose such a *mandamus* to go, and they were to refuse to amove him, no remedy remains but the present. As to the case of *Vaughan and Lewis*, the fact there relied on was that the party was not resident at the time of his election: but it did not appear that he did not reside there afterwards. The question was confined to his eligibility at the time: therefore the opinion of Lord *Holt* was extra-judicial; and at most was only the opinion of one judge; and that too delivered out of Court. And at any rate the report must be erroneous, for it is there stated that *non fuit electus* is a bad return, which has been often ruled otherwise. The other cases cited only prove that a corporation have a power to amove, which does not affect this question.

Lord KENYON, Ch. J.—It is admitted that the defendant was at first legally elected to the office of alderman of the borough of *Bedford*; and I am of opinion that, on the conveni-



1788.

The KING  
against  
HEAVEN.

ence of the thing, on reason by analogy to other cases, and on authority, his ceasing to reside in the borough did not *ipso facto* put an end to his corporate existence. First, in point of convenience; At what time can it be said that he ceased to be a member? Was it at the first moment when he left the town? And shall all those persons, who derive their title under him during these last thirteen years, be declared unduly elected? Such a doctrine would be productive of infinite confusion and hardship on third persons. Then consider this by analogy to other cases: the statute of *Westminster 2. (a) c. 1.*, which respects the operation of fines, declares that fines levied contrary to that statute shall be *ipso jure* null: and yet it has been repeatedly determined (b) that they are only voidable, and must be reversed by writ of error. Then as to authorities: it is true, indeed, that the case in *Cartbew* (who in general is a good reporter) was not a judicial authority: But the parties themselves referred the question to Lord *Holt*, a lawyer of the greatest eminence; and as far as a point can derive authority from any one person, the opinion of Lord *Holt* upon this subject has great weight: and he thought that the office of common councilman did not become *ipso facto* vacant by non-residence, and that the party did not lose his franchise till a sentence of amotion by the corporation had been pronounced. Therefore I am of opinion, on reason, on analogy, and on the case cited, (there being no contrary decision) that there must be a judgment of amotion against this defendant by the corporation of *Bedford* for non-residence, before we can interpose by granting an information in nature of a *quo warranto* against him.

ASHHURST, J.—Wherever a person has been once duly elected into a corporate office, and forfeits it by misconduct, his amotion by the corporation is a previous and necessary step to be taken, before this Court will grant an information in nature of a *quo warranto* against him. For when a corporator neglects the duties of his office, the corporation should first take cognizance of it and deprive him, and then it may be properly brought before this court. And there is no inconvenience in this mode of proceeding: for if any persons find themselves injured by the non-residence of a corporator, and the corporation refuse to interfere and to do their duty, such persons may apply to this

(a) 13 Ed. 1. ff. 1. c. 1.

(b) 2 Inst. 336.



Court for a mandamus directed to the corporation to enforce a performance of their duty. There is no case in which this Court has interfered by granting a *quo warranto* information under circumstances similar to the present. And the case of *Vaughan v. Lewis*, though not exactly like this, is yet in some degree an authority for the judgment which we are now giving. For though it is said in this case that the office of alderman becomes vacant by non-residence, yet that must be understood to mean, that it shall be avoided by legal means. Therefore I am clearly of opinion that this application is ill founded for want of the previous motion of the defendant by the corporation.

GROSE, J. (a)—I thought it was a settled principle of corporation-law that a corporator must be disfranchised by the corporation for non-residence, before any application for an information in nature of a *quo warranto* can be granted. The principles laid down by my Lord Chief Justice are founded in good sense; and they are strongly corroborated by the case referred to Lord Holt. And there being no decision against it, I think it would be too much to grant this information.

Rule discharged.

(a) Abf. Buller, J.

### The KING *against* WILLIAM PATEMAN.

Thursday,  
Nov. 27th.

A Rule had been obtained (calling on the defendant to shew cause why an information in nature of a *quo warranto* should not be exhibited against him to shew by what authority he claims to be an alderman of Bedford,) on an affidavit which stated the constitution of the borough as in the last case. It also stated that there is a ministerial officer in the borough called the town clerk, attendant on the corporate courts and meetings, which corporate courts and meetings are subject to the control and direction of the aldermen. The person, who made the affidavit, also stated that *he believed that the accounts of the town clerk are adjusted and allowed of by the aldermen*; and that by the ancient usage and custom of the borough, the office of town clerk is incompatible with that of alderman. It then stated that the

tion from the latter office. And if the person so appointed continue to exercise the office of alderman, this court will grant an information in the nature of a *quo warranto* against him.

Where the townclerk's accounts are allowed by the aldermen, or where a townclerk acts ministerially under the aldermen, who are judicial officers, the offices are incompatible; and the appointment to the former office is equivalent to an motion by the corpora-

defendant,



1788.

The KING  
against  
PATEMAN.

defendant, who had been a burghess, was duly elected mayor at Michaelmas 1782, which office he served till Michaelmas 1783; when he became an alderman. In September 1784 he was elected town clerk, which office he has since exercised together with that of alderman, contrary to the usage of the borough; and has from time to time acted as one of the aldermen who have allowed his accounts as town clerk.

The defendant in his affidavit alleged that he had never officiated as town clerk, the whole duty of that office having been transacted by his deputy. He denied that the two offices were incompatible, and that the aldermen settled the town clerk's accounts, they being usually settled and adjusted by the chamberlain; and said that the corporation always appeared satisfied with the defendant's conduct as an alderman, as well as in the management of the town clerkship by deputy. He then stated two instances in the borough, the one of the offices of town clerk and common council man having been enjoyed by the same person in 1721, the other of the enjoyment of the offices of town clerk and alderman by a Mr. Hill from 1750 to 1784.

Partridge and Wigley now shewed cause, and relied on the objection which prevailed in the last case, namely, that the defendant had not been previously removed from his office of alderman by the corporation. But there was not any ground for removal even by the corporation in this case; for the two offices are not necessarily incompatible. The only ground, on which they are stated by the prosecutor to be incompatible, is fully explained by the defendant's affidavit; and there are two instances in which these offices have in point of fact been enjoyed together in this corporation.

Wilson, in support of the rule, contended, on the authority of *Milward v. Thatcher* (a), and the note in *Dyer* 332. b. that the offices of town clerk and alderman were incompatible. In *Milward v. Thatcher*, where the plaintiff who was a jurat of the borough of *Hastings* was afterwards elected town clerk, the real question was, whether the two offices were incompatible. One of the issues directed by the Court was to try whether the plaintiff was duly elected to the office of town clerk; and after arguing the special case the Court determined that he was duly elected, notwithstanding he was a jurat at the time of his election; and immediately after the determination of that case they

(a) *Ante*, 81.

granted



granted a *mandamus* to the corporation to fill up the office of jurat which he had thereby vacated. Now that could only have been granted on the ground of the two offices being incompatible. But in this case there cannot be any *mandamus* to compel the corporation of *Bedford* to fill up the office of alderman, because the number of aldermen is indefinite. And however doubtful it may be as a general question whether these two offices are or are not incompatible, it appears that they are so in this borough: For it is expressly alleged that the town clerk's accounts are allowed by the aldermen. And notwithstanding this fact is in some degree denied, yet that alone is a sufficient ground for granting this information, in order that it may be tried.

Lord KENYON, Ch. J.—I do not think that the offices of alderman and town clerk are necessarily incompatible; for in some corporations aldermen are not judicial officers. If an alderman be also a magistrate, and the town-clerk act ministerially under him, then indeed these two offices cannot be held by the same person. Now here it is a question whether the town clerk's accounts are not allowed by the alderman: if they are, I think the two offices are incompatible; and this information should be granted for the purpose of trying that fact. In the case of *The King v. Gayer* (a) it seemed to be agreed that the offices of justice of the peace and overseer of the poor were incompatible, because the accounts of the latter were subject to the control of the former. Then if these offices be not compatible, there is not the same reason for refusing this application, which prevailed in the last case. For the appointment of the defendant to the office of town clerk was an act of the corporation themselves, which, if the offices be incompatible, is equivalent to an amotion.

ASHHURST, J. and GROSE, J. (b) gave their opinions to the same effect.

Rule absolute.

(a) 1 Burr. 245. (b) *Abf. Buller. J.*

DOE on the Demise of Lord PALMERSTON against  
COPELAND.

Friday,  
Nov. 28th.

SHEPHERD had obtained a rule, calling upon the defendant to shew cause why the writ of possession which had been issued in this cause should not be set aside for irregularity.

want of the defendant's confessing lease, entry, and ouster, he is not entitled to sign judgment against the casual ejector till the *posse* comes in on the day in bank.

Where the plaintiff in ejectment is nonsuited at the trial for



1788.

DOE  
against  
COPELAND.

and the possession restored, &c. The ground of the motion was that the defendant not having confessed lease, entry, and ouster, at the trial, in consequence of which the plaintiff was nonsuited, the latter had immediately entered up judgment against the casual ejector, and taken out the writ of possession before the *postea* came in on the day in Bank.

*Law* now contended for the regularity of the proceeding, and cited *Sty. Prac. Reg. tit. Contempt*, p. 166. edit. of 1707, in support of it: and observed that the statute 4 Geo. 2. c. 28. did not point out any particular time for signing judgment against the casual ejector, or taking out the writ of possession. This question he said had been lately very fully considered in the Court of *Common Pleas* (a), where the practice as noticed in *Styles* was approved and confirmed.

*Shepherd*, in support of the rule, said that whatever the practice might formerly have been, it was clearly otherwise now: and it was highly reasonable that it should be so, for the defendant might be able to assign a satisfactory reason to the Court for setting aside the judgment; as, for example, want of due notice of trial.

The Court, upon reference to the master, were perfectly satisfied of the irregularity; and stated the practice from *Lilly's Prac. Reg. tit. Postea* (b) to be that after a nonsuit at *Nisi Prius* for want of the defendant's confessing lease, entry, and ouster, the writ of possession cannot be taken out till after the *postea* comes in on the day in Bank; and

Lord KENYON, Ch. J.—added, that if the practice in *C. B.* were otherwise settled, that would not alter the mode of proceed-

(a) *Throgmorton d. Fairfax v. Bentley*, H. 27 Geo. 3. C. B.

*Kirby*, Serjt. moved for a rule to shew cause why judgment against the casual ejector, and the writ of possession issued thereon, should not be set aside for the defendant's not having confessed lease, entry, and ouster, at the trial, whereby the plaintiff was nonsuited. The question was whether judgment could be signed, and writ of possession taken out, before the day in bank.

*Walker*, Serjt. shewed cause, relying upon the words in the consent rule that in default thereof [*i. e.* confessing lease, entry, and ouster], judgment be entered against the defendant; and he cited *Sty. Prac. Reg.* 442, 3. 3d. ed.

The Court took time to consider of the question; and, it appearing that the usual practice had been to sign judgment and take out the writ of possession immediately after the trial, they held that the proceedings in this case were regular, and discharged the rule. The Ch. J. observing that there was less possible inconvenience in this practice than otherwise. He also observed upon the difference between the consent rule and the condition rule; the latter expressly stays execution; but by the other it is expressly consented, that judgment may be entered in default of defendant's confessing lease, entry, and ouster.

(b) 2. vol. 423. ed. 1735. and this agrees with *Turner and Barnaby*, Salk. 259.

ing



ing in this Court; and he thought the latter method beyond all comparison the best.

1788.

However, as no reason appeared on the merits why the lessor of the plaintiff was not entitled ultimately to recover possession, it was agreed that he should remain in possession; and it was referred to the Master to settle what damages the defendant had sustained by the premature issuing of the writ of possession.

DOE  
against  
COPELAND.

ROBINSON *against* HARDCASTLE.

THE certificate which was given under this title in the Reports of *Easter Term*, 28 *Geo. 3.* [*ante* 380.] was inserted prematurely: it was ultimately sent to the Lord Chancellor in the following terms.

Having heard counsel on the case referred to us, we are of opinion that the plaintiff *Elizabeth Robinson* is not entitled to any estate or interest under the indentures of lease and release, and settlement of the 13th and 14th *July* 1713, or the will of *James Dunn* her father, in that part of the estate at *Great Chilton* comprised in the settlement, which lies on the east side of the post road, leading from *Rushey Ford* to *Ferry Hill*.

W. H. ASHHURST.  
F. BULLER.  
N. GROSE.

ZACHARY *against* SHEPHERD.

Friday,  
Nov. 28th.

RUSSEL moved that Master *Foster*, to whom this cause had been referred, should reconsider the award which he had made, for want of sufficient materials being laid before him, which the party could not procure till this time. The award was made before this term; and he observed, upon an objection started by the Court whether he had applied in time, that the statute 9 & 10 *W. 3. c. 15. s. 2.* which required these sort of motions to be made before the last day of the next Term after the award made, only prescribed the limitation in cases where

A motion that an award should be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him at that time, must be made

before the last day of the next term after such award made, according to 9 & 10 *W. 3. c. 15. s. 2.* although the arbitrator be not charged with corruption or undue means.

corruption



1788.

ZACHARY  
against  
SHEPHERD.

corruption or undue means were attributed to the arbitrator; which was so far from being the case here, that the party was solicitous that the matter should be referred back to the same arbitrator. But

Lord KENYON, Ch. J.—Upon referring to the act of parliament, was clearly of opinion, together with the rest of the Court (a), that the motion ought to have been made before the last day of the term after the award; and therefore they

Refused the Rule.

(a) Abf. Buller, J.

### The END of MICHAELMAS TERM.



INDEX  
 TO THE  
 PRINCIPAL MATTERS,  
 In the SECOND VOLUME.

A.

**A**CCORD *and Satisfaction.*  
*See* COMPOSITION.

ACCOUNT.

*See* ASSUMPSIT No. 12, 13.

ACT of Parliament.

*See* STATUTE.

ACTION upon the Case.

*See* Case ACTION upon the. ASSUMPSIT.

ACTION Penal.

*See* PENAL ACTION.

ADMINISTRATOR.

*See* EXECUTOR.

ADMIRALTY Jurisdiction.

1. If the owner of a ship charge her for repairs done in *England*, by an instrument under seal, stated to be by way of bottomry, upon which she is afterwards seized by admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence, but between the seizure and decree a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the

vessel under this writ; nor can he maintain trover against the officer in possession by the warrant of the court of admiralty.  
*Ladbroke v. Crickett.* Page 649

2. Where the court of admiralty have given a sentence, it shall be taken that they had jurisdiction, unless the contrary appear on the face of it. *ib.*

AFFIDAVIT.

*See* EVIDENCE, No. 6.

VERDICT.

1. An affidavit to hold to bail, stating that the defendant is indebted to the plaintiff in a certain sum, as appears by the master's allocatur, is not sufficiently positive. *Powell v. Portherch.* 55

2. Proceedings in a penal action on 25 *Ed.*

3. *ft.* 4. c. 3. stayed on motion, because no affidavit had been filed that the offence was committed within the county where the action was brought, or within a year, according to 21 *Jac.* 1. c. 4. *White Q. T. v. Boot.* 274

3. If an affidavit be filed without any title, the court cannot take any notice of it, though the adverse party is willing to wave the objection. *Owen v. Hurd.* 644

9 P

4. If



## INDEX TO THE PRINCIPAL MATTERS.

4. If an affidavit to hold the defendant to bail state an act to have passed in the 27 Geo. 3. which was passed in the 22 Geo. 3. under which a penalty was incurred, it is a fatal objection, even though the title of the act be properly set forth. *Watson v. Shaw.* Page 654
5. It is sufficient if the affidavit, on which the defendant is holden to bail for an offence against the lottery act, shew the nature of the offence, without stating the particular circumstances of it. *ib.*

### AGREEMENT.

See LANDLORD and TENANT, 6, 7, 8, 9.

1. If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished in the time, such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed. *Fletcher v. Dyche.* 32
2. An instrument on an agreement stamp, reciting that A. in case he should be intitled to certain copyhold premises on the death of B. would immediately demise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Doe v. Clare.* 739
3. If there be an agreement before marriage that a settlement shall be made of the wife's estate, reserving to her a power of disposing of it, which agreement is signed by the intended husband and wife, but not sealed; and before the marriage the wife disposes of it to the husband, who survives her, and devises the estate by will; the title of his devisee is such a doubtful equity as cannot be set up in an ejectment against the title of the wife's heir at law. *Doe v. Staple.* 684

### ALDERMAN.

See QUO WARRANTO INFORMATION. No. 9, 10, 11.

### ALLOWANCE.

See CERTIFICATE.

### AMENDMENT.

See EXECUTION. No. 7.

Where a *qui tam* action for usury had been depending four years, the court would not allow amendments to be made in the declaration, though the pleadings were still in paper. *Goff. v. Popplewell.* Page 707

### AMOTION.

See QUO WARRANTO INFORMATION, 6, 7, 8, 10.

### ANNUITY.

1. Where an annuity bond, granted by two, becomes void by the neglect of the grantee in not registering a memorial under 17 Geo. 3. c. 26, he cannot recover back any part of the consideration money from the one who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in a receipt for it. *Straton v. Rastall.* 366
2. An annuity deed is absolutely void, and not merely voidable, if the memorial be not registered according to the directions of the 17 Geo. 3. c. 26. s. 1. *Crofsley v. Arkwright.* 603
3. Therefore where a person, against whom a writ of *fi. fa.* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable therefrom, the sheriff is warranted in returning *nulla bona* if the memorial of the annuity be not registered. *ib.*

### APPEAL.

See EXCISE, No. 5.

### APPRENTICE.

See SETTLEMENT by Apprenticeship.

1. Where by the constitution of a corporation a person having served a seven years apprenticeship to a freeman residing in the town is entitled to his freedom, and where by a bye-law the indentures must be enrolled by the town clerk within a limited time, an apprentice who is bound to a freeman, resident only occasionally, and whose service is to be performed at another place, is not entitled to have his indentures enrolled, nor will the court grant a mandamus to the



## INDEX TO THE PRINCIPAL MATTERS.

the town clerk for that purpose. *The King v. Marshal.* Page 2

### APPROVEMENT.

See INCLOSURE, No. 1.

### ARBITRATOR.

See AWARD.

1. Arbitrators who have the power of choosing an umpire may choose one the instant they begin to take the matters referred into consideration. *Roe v. Doe.* 645

### ARREST.

See FALSE IMPRISONMENT, No. 1.

INSANITY, No. 1. SOLDIERS, No. 2, 3.

### ASSIGNMENT.

See BILL of Lading.

### ASSIZE.

See CLERK of Assize. OFFICE, No. 6.

### ASSUMPSIT.

1. If the person, for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of frauds. *Matson v. Wharam.* 80
2. There is no distinction between a promise to pay for goods furnished for the use of another made *before* they are delivered, and one made *after*. *ib.*
3. A promise in these words, "if you do not know him, you know me, and I will see you paid," not being in writing, is void by the statute of frauds. *ib.*
4. So is this, "you must supply my mother-in-law with bread, and I will see you paid." *Jones v. Cooper*, there cited, and also in *Cowp.* 227.
5. Where a person will not rely on the promise which the law will raise, but takes a bond as a security, he cannot resort to an action of *assumpsit*. *Toussaint v. Martinant.* 100
6. Therefore if a surety bound with his principal for payment of money by instal-

ments take a bond from the principal conditioned for payment of the amount of the instalments before the first of them will become due, and before that time the principal becomes bankrupt and obtains his certificate, and afterwards the instalment bond is discharged by the surety, he cannot maintain an action against the principal for money paid to his use. Page 100

7. If a trader become a bankrupt by lying in prison two months after an arrest, his assignees may maintain an action for money had and received against a person, who, having notice that a commission would be issued against him, sold his goods and paid him the produce before the expiration of the two months. *King v. Leith.* 141
8. The action of *assumpsit* for money had and received is like a bill in equity; and therefore the party must shew that he has conscience and equity of his side; so that it lies not against one who was known to be only a surety in an annuity bond for the payment of the annuity, to recover the consideration money after the annuity had been set aside for want of a memorial, though the surety had joined in a receipt for the money. *Straton v. Rastall.* 370
9. One partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith v. Barrow.* 476
10. Where money is owing to two partners, and, after the death of one, it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor. *ib.*
11. The same of money received after the testator's death, for which his executor may maintain this action in his own right. *ib.*
12. Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust, and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired,



## INDEX TO THE PRINCIPAL MATTERS.

- expired, and account together, and strike a balance which is in favour of the plaintiff, including several items not connected with the partnership, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise. *Foster v. Allanson*. P. 479
13. An action of *assumpsit* may be maintained upon an express promise for the amount of a balance struck on a partnership account, though there was a covenant between the parties to account. *Moravia v. Levy*. *ib.* 483. n.
14. If all the creditors of an insolvent consent to accept a composition for their demands upon an assignment of his effects by a deed of trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action. *Cockshott v. Bennett*. 763
15. For no subsequent promise can set up a security which is void at its creation. *ib.*
16. If it be only voidable, like a security given by an infant, it may be revived by a subsequent promise. *ib.* 766
17. But if a bankrupt, or insolvent, after becoming free from his engagements, voluntarily give security for a former demand, which is only due in conscience, it may be enforced in a court of law. *ib.* 765
1. A submission to an award between *A.* and *B.* the parties on the record having been made a rule of court, which award not having been made in time, the dispute had been referred to a second arbitrator to settle by *B.* and *C.*, who were the real parties in the suit, no attachment can issue against *B.* for not obeying the award made by the second arbitrator, because the reference should be made by the parties on the record; and even if it had, there should have been another rule to make the second submission a rule of court. *Owen v. Hurd*. Page 643
2. And as the court had no jurisdiction in this case, they could not go into the merits, though *B.* consented to waive the objection. *ib.*
3. An arbitrator may award costs without any express authority for that purpose. *Roe v. Doe*. 644
4. Arbitrators having power to choose an umpire may elect one before they enter upon the examination of the matter referred to them. *ib.*
5. A submission to arbitration of *all matters in difference between the parties in the suit* is not confined to the subject matter in the particular action depending, but will extend to cross demands between the parties, though not pleaded by way of set-off; and the costs being to abide the event makes no difference. *Malcolm v. Fullarton*. 645
6. But a reference of *all matters in dispute in the cause between the parties* is confined solely to the matters in dispute in that suit. *ib.*
7. A motion, that an award should be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made before the last day of the next term after such award made, according to the 9 & 10 W. 3. c. 15. s. 2. although the arbitrator be not charged with corruption or undue means. *Zackary v. Shepherd*. 781

### ATTACHMENT.

See PRACTICE, No. 1.

1. The court refused to grant an attachment against the sheriff, for neglecting to take a replevin bond. *The King v. Lewis*. 617
2. The party injured has his action against the sheriff. *ib.*

### AVERAGE.

See INSURANCE, No. 13, 14, 15.

### AWARD.

See BAIL, No. 1. BANKRUPT, No. 24, 25.

BAIL.



## INDEX TO THE PRINCIPAL MATTERS.

### B.

#### B A I L.

See BAIL in Error. FELONY, No. 2, 3.  
PLEADING, No. 19. VAGRANT act.  
PRACTICE, No. 31, 33. AFFIDAVIT.

1. **W**HERE a cause, in which the defendant has been holden to bail, is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10*l*. the defendant may be holden to bail again in an action upon the award. *Collins v. Powell.* Page 756

2. The court set aside the proceedings in *scire facias* against bail because they were summoned only an hour before the court rose on the return day. And the sheriff's return of *scire feci* does not estop the bail from shewing that they were summoned so late on the return day, that they could not bring in their principal before the rising of the court. *Webb v. Harvey.* 757

#### B A I L in Error.

See PRACTICE, No. 6, 7, 9.

1. In debt upon recognizance, bail in error in the Exchequer Chamber are not liable to pay interest on the judgment between the signing of the judgment in *B. R.* and the affirmance of it in *Cam. Scac.* *Frith v. Leroux.* 57

2. But when the judgment is affirmed, it then becomes the debt of the bail; and if an action be brought against them on that judgment, the jury may give interest as damages for the detention of the debt. *ib.*

3. And if an action of debt be brought on the judgment, affirmed in error, against the party himself, the jury by way of damages may give interest upon the sum recovered by the judgment from the time of signing it, where by the practice of the court in which error is brought such interest is not allowed in costs upon the affirmance. *Entwistle v. Shepherd.* 78

#### B A I L B O N D.

See PLEADINGS, No. 19.

1. The statute 23 *H. 6. c. 9.* relating to bail-bonds is a public act; therefore the court will take notice of it, though it be not pleaded *Samuel. v. Evans.* Page 569
2. If it appear in a declaration by the assignee of the sheriff on such bond that the bond is void by the provisions of that statute, the court on motion will arrest the judgment, after verdict, against the defendant, upon a plea of *non est factum.* *ib.*
3. A sheriff's bond stated to have been taken on the 4th November, conditioned for the defendant's appearance on the morrow of All Souls, [*Scil. 3d November*] is void by the statute. *ib.*

#### B A I L I F F.

See PRACTICE, No. 28, 29, 30. SHERIFF.

1. The bailiff of a liberty, who has the return and execution of writs, is liable to an action of debt for an escape, if he remove a prisoner taken in execution to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff. *Boothman v. The Earl of Surry.* 5.
2. A bailiff, who has arrested a prisoner on mesne process, may retake him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest. *Atkinson v. Matteson.* 172

#### B A N K E R.

See INTEREST, No. 3. BANKRUPT, No. 14.

1. A banker is not justified in paying the drafts of a person who has placed money in his hands after he has notice of an act of bankruptcy committed by him. *Vernon v. Hankey.* 113.

#### B A N K R U P T.

See ASSUMPSIT, No. 14, 17. WITNESS,  
No. 4. BILL of Lading.

- 1 Assignees of a bankrupt may sue both in the debt and detinet. *Winter v. Kretchman.* 46
2. Where an act is a clear unequivocal act of bankruptcy, it cannot be explained by



## INDEX TO THE PRINCIPAL MATTERS.

- by any subsequent circumstances. *Colkett v. Freeman.* Page 59
3. Therefore where *A.* was denied in the morning by express orders to the holder of a bill which was due, it was a complete act of bankruptcy, though he afterwards paid the bill before five o'clock in the same day, and though by the custom of merchants in *London* the payer of a bill has the whole day, on which it becomes due, till five o'clock, to discharge it. *ib.*
  4. But where the act is in itself doubtful, it may be explained. *ib.*
  5. A bill having become due, and the drawer, being pressed for payment, desired the holder to call upon him the next morning at a friend's house and he would pay him, the holder went accordingly, and was denied at the drawer's request: Upon being asked by his friend if he was aware that he had committed an act of bankruptcy, he answered with surprise in the negative, and said he did not mean to do so; and went afterwards and paid the bill. Lord *Mansfield* told the jury that if they were satisfied that the denial had been with a view to delay the creditor at the time, it was an act of bankruptcy; and if so, it could not be purged by paying the bill afterwards. *ib.*
  6. If a surety, bound with his principal for payment of money by instalments, take a bond from the principal conditioned for payment of the amount of the instalments before the first of them will be due, and before that time the principal become bankrupt, and obtain his certificate, and afterwards the instalment bond is discharged by the surety, still he cannot maintain an action against the principal for money paid to his use. *Toussaint v. Martinnant.* 100
  7. If no bond had been given, the law would have raised an *assumpsit* against the principal: but as the surety did not rely on the promise which the law would have raised, but took a bond as a security, he cannot resort to an action of *assumpsit*. 104
  8. But he might have proved the bond under the commission. *ib.* & *Martin v. Court.* 640
  9. Consequently the bankrupt's certificate is a bar to an action by the surety on the counter bond. *ib.*
  10. A banker is not justified in paying the drafts of a person, who has placed money in his hands, after he has notice of an act of bankruptcy committed by him. *Vernon v. Hankey.* Page 113
  11. A proviso in a lease for 21 years that the landlord shall re-enter on the tenant's committing any act of bankruptcy, whereon a commission shall issue, is good. *Rodem. Hunter v. Galliers.* 133
  12. Where a trader becomes a bankrupt by lying in prison two months, the act of bankruptcy relates back to the arrest, so as to vest his property in the assignees from that time. *King v. Leith.* 141
  13. Therefore the assignees may maintain an action for money had and received against a person, who, having notice that a commission would be issued against him, sold his goods and paid him the produce before the expiration of the two months. *ib.*
  14. How assignees of a bankrupt may declare in *scire facias*. See *Pleadings*. No. 3.
  15. Where, after a recovery in ejectment, and before an action of trespass for mesne profits, the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict in executing a writ of inquiry in the action for mesne profits, the court refused to set aside the inquiry, because the plaintiff might have proved the costs as a debt under the defendant's commission of bankrupt. *Gulliver v. Drinkwater.* 261
  16. The plaintiffs together with *A.* and *B.* being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which was paid solely by the plaintiffs, *A.* and *B.* having in the mean time become bankrupts: an action cannot be brought by the plaintiffs alone for a moiety of the restitution money and costs, because it was either a partnership transaction, when *A.* and *B.* ought to be joined, or not, when separate actions should be brought by each of the persons paying. *Graham v. Robertson.* 282
  17. When



## INDEX TO THE PRINCIPAL MATTERS.

17. When the assignees of a bankrupt have recovered a sum of money from the bankrupt's banker, received by him, and paid over to a creditor of the bankrupt, with knowledge of the bankruptcy, they cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy. *Vernon and others assignees of Tyler v. Hanson.* Page 287
18. But the assignees had their option at first to bring the action against the banker or against the person to whom the banker paid the money under the above circumstances. *ib.*
19. Where a ship was mortgaged at sea, with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand, the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival, he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees. *Atkinson v. Maling.* 462
20. An assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. *Lempriere v. Pasley.* 485
21. Those who are privies, and assent to a deed of assignment by a debtor, cannot set it up as an act of bankruptcy. *Bamford v. Baron.* 594 n. a.
22. If a trader, after committing an act of bankruptcy, take a house and agree to pay half a year's rent in advance, where by the custom of the country half a year's rent becomes due on the day on which the tenant enters; the landlord, after an assignment under the commission, and before the year expires, may distrain the goods on the premises for half a year's rent; or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent. *Buckley v. Taylor.* 600
23. For though a bankrupt cannot give a lien on any particular goods, yet he may take a demise, and agree that the rent shall be payable on a particular day, in which case the law gives the landlord a power of distraining on that day. Page 603
24. Assignees of a bankrupt, having received 1500*l.* from a debtor to the bankrupt as a debt due to his estate, and having commenced an action against him for a further demand on the same account, to which he had only pleaded the general issue, agree with him to refer *all matters in difference between the parties in the cause*; the arbitrator has power to award that the assignees shall repay a part of the sum already received, if it appear to have been paid by mistake. *Malcolm v. Fullarton.* 645
25. The only case where a party shall be bound by the payment of money, though by mistake, is where it is paid into court under a rule. *ib.*
26. If the payee of a bill of exchange, received from a third person as the price of an estate, give time to the drawee on condition that he shall allow interest, and afterwards the drawee discharge the bill, having in the mean time committed an act of bankruptcy; this is not such a payment in the ordinary course of trade as is protected by the 19 *Geo. 2. c. 32.*; and the assignees may recover the money from the payee. *Vernon v. Hall.* 648
27. If *A.* be bound with *B.* as a surety for the payment of a sum certain, and take an absolute bond from *B.* payable the day before the original bond will become due, and *B.* become a bankrupt before the day of payment; *A.* may prove this debt under the commission, and *B.*'s certificate will be a bar to an action by *A.* on the counter bond, though *A.* does not pay the original bond till after *B.* has committed an act of bankruptcy. *Martin v. Court.* 640

### BARON and FEME.

See EJECTMENT, No. 2.

1. Husband and wife shall not be called in any case to give evidence even tending to criminate each other. *The King v. The Inhabitants of Cliviger.* 263

2. In



## INDEX TO THE PRINCIPAL MATTERS.

2. In a case of settlement, where a marriage in fact had been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shews him to have been guilty of bigamy. *Page 263*
3. Husband and wife may prove their own marriage on a question of settlement. *ib.*

### BASTARDY, *Order of.*

See SOLDIERS, No. 2, 3.

### BILL of EXCEPTIONS.

See EXCEPTIONS, *Bill of.*

### BILL of EXCHANGE.

See BANKRUPT, No. 3. 26. FORGERY.  
USURY, No. 1.

1. The objection arising from want of notice of non-acceptance of a bill of exchange from the holder to the drawer is done away by shewing that the latter had no effects in the hands of the drawee at the time. *Rogers v. Stephens.* 713
2. *Quære*, how far this rule holds, if the drawer shew from other circumstances that in fact he sustained an injury for want of such notice? *ib.*
3. But at any rate a subsequent promise by the drawer to pay the bill is a waiver of the want of notice. *ib.*
4. And if, on demand made, he answer that "the bill must be paid," it is equivalent to a promise to pay. *ib.*
5. Where a bill of exchange payable 40 days after sight is refused acceptance, and an action is brought in order to charge the drawer, proof of the *noting* of the bill for non-acceptance is not sufficient, without proving that it was also protested for non-acceptance, though there be a subsequent protest for non-payment. *ib.*

### BILL of LADING.

1. The consignor may stop goods *in transitu* before they get into the hands of the consignee in case of the insolvency of the latter: but if the consignee assign the bills of lading to a third person for a valuable considera-

tion, the right of the consignor as against such assignee is devested. *Lickbarrow v. Mason.* *Page 63*

2. There is no distinction between a bill of lading indorsed in blank and an indorsement to a particular person. *ib.*
3. But if the consignee, to whom the bill of lading is indorsed in blank, assign it over as a security for acceptances given by the assignee not amounting to the value of the goods, and afterwards by an agreement between them they become partners in the goods, by which agreement it appears that the consignor has not been paid for them, the assignee of the bill of lading cannot maintain *trover* against the consignor if he stop the goods *in transitu* upon the insolvency of the consignee. *Salomons v. Nissen.* 674
4. An assignment of goods at sea as a security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods, and the indorsement of the bill of lading. *Lempriere v. Pasley.* 485

### BILL of SALE.

See SHIP, No. 1, 2.

1. It is a general rule in the transfer of chattels, that the possession must *accompany and follow the deed*. *Edwards v. Harben.* 587
2. Therefore where the conveyance is *absolute*, the possession must be delivered immediately: where it is *conditional*, it will not be rendered void by the vendor's continuing in possession till the condition be performed. *ib.*
3. An *absolute* conveyance of personalty, without possession, is *in point of law* fraudulent; and not merely *evidence of fraud*. *ib.*
4. If a creditor take an *absolute* bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued as executor *de son tort* for the debts of the deceased; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors. *ib.*

### BOND



## INDEX TO THE PRINCIPAL MATTERS.

### B O N D.

See SET-OFF, No. 1. Bankrupt, No. 6.  
Surety, Annuity, No. 1. Insurance, No. 11.  
Pleading, No. 13, 14, 17, 18. Bail Bond.

1. In an action on a bond damages may be recovered for more than the penalty. Lord *Lonsdale v. Church.* Page 388
2. Therefore in debt on bond with condition to account for money to be received, the Court will not stay proceedings upon paying the penalty into Court. *ib.*
3. Where a woman on her marriage with a copyholder of a manor, where the widows of husbands dying seised are entitled to their free bench, gave a bond that the son of her intended husband by a former wife should have possession of part of the copyhold estate after the death of the husband, on condition of his repairing the part of the house reserved for her, &c. this was held to be a good consideration. *R. v. Inhabitants of Lopen.* 580

### B O O K S.

1. In trover for goods, by the assignees of a bankrupt, where the defence was that they were sold by the plaintiff, and defendant moved for leave to inspect the bankrupt's sale books, the Court gave him time to plead, in order that he might gain time to obtain a discovery from the court of chancery in the mean while. *Whitter v. Cazelet.* 683
2. For inspection of books relating to the revenue. See Evidence. No. 9.

### B O T T O M R Y.

See ADMIRALTY.

### B O T T O M R Y B O N D.

See INSURANCE, No. 11.

### B R I D G E.

See COUNTY.

### B Y - L A W.

1. A by-law requiring the indentures of apprenticeship of such who are bound apprentices to freemen to be inrolled within four

months from the date, in order to entitle themselves to their freedom, seems good. *The King v. Marshal.* Page 2

### C.

### C A L L I S.

1. *CALLIS*'s readings are good authority on the subject of Sewers. *Dore v. Gray.* 365

### C A S E, Action upon the.

See TRESPASS, No. 3.

1. Where a justice of the peace maliciously grants a warrant against another without any information upon a supposed charge of felony, the remedy against the justice is trespass for the false imprisonment, and not case. *Morgan v. Hughes.* 225
2. A declaration in an action for a malicious prosecution for felony must state that the prosecution is at an end; and alleging that the plaintiff was discharged from his imprisonment is not sufficient. *ib.*
3. The word *acquitted* indeed must be taken in its legal sense, namely, by a jury. *ib.* 231
4. So if it had been alleged that the plaintiff had been discharged by the grand jury's not finding the bill, that would have shewn a legal end to the prosecution. *ib.* 232
5. The distinction between case and trespass is this; where the immediate act of imprisonment proceeds from the defendant, the action can only be trespass: but where the act of imprisonment by one person is in consequence of information from another, there an action on the case is the proper remedy. *ib.*
6. An action upon the case will not lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair. *Russell v. The Men of Devon.* 667
7. If the purchaser of a horse, warranted to be of a certain age, discover that he is of a greater age, and offer him to the seller who refuses to take him back, he may sell the horse to any third person, and then maintain an action against the seller on the



## INDEX TO THE PRINCIPAL MATTERS.

the warranty. *Buchanan v. Parashaw.*  
Page 745

### CASES doubted or denied.

|                                                                                 |      |
|---------------------------------------------------------------------------------|------|
| <i>Cumber v. Wane</i> [1 Str. 426.]                                             | 28   |
| <i>The King v. Goter.</i> M. 16 G. 3.                                           | 48   |
| A case mentioned at the end of <i>Wate</i> and<br><i>Brigs.</i> 1 Lord Ray. 36. |      |
| <i>Windham v. Clere.</i> Cro. Eliz. 130.                                        | 231  |
| <i>Coveney's case.</i> Dyer 209.                                                | 355  |
| <i>Bagg's case.</i> 11 Rep. 99.                                                 | 355  |
| <i>Mulliner v. Wilks.</i> E. 23 Geo. 3. B. R.                                   | 443  |
| <i>Austen v. White.</i> Cro. Eliz. 214.                                         | 475  |
| <i>The King v. Bennet.</i> 1 Str. 101.                                          | 484  |
| <i>White v. Pealy.</i> Dougl. 49.                                               | 309. |

### CERTIORARI.

1. A *certiorari* is granted of course on the application of the Crown. *R. v. Eaton.* 89
2. *Secus*, on the application of a defendant: he must lay some ground for it before the Court. *ib.*
3. A *certiorari* lies to remove a conviction on the 16 Geo. 3. c. 30. (to prevent the stealing of deer) if the defendant has not appealed to the quarter sessions. *ib.*
4. The Court of B. R. will not grant a *certiorari* to remove the record and proceedings out of a court leet, in order to enquire into the propriety of an amercement, where the fine has been estreated into the dutchy chamber of *Lancaster*, and paid. *R. v. Heaton.* 184
5. The Court will not grant a *certiorari* to a defendant after he has appealed to the sessions, pending such appeal. *The King v. Sparrow.* 196. n.
6. The Court will not grant a *certiorari* to remove the assessments of the land-tax. But if an information be moved for against the commissioners of the land-tax, the Court will admit an attested copy of the assessment as evidence, instead of the original. *The King v. King and others.* 234
7. Neither will a *certiorari* be granted to remove a poor rate, on account of the public inconvenience. *ib.* 235
8. It is no objection to a *certiorari* to remove a presentment of a road made by a justice of peace under the 24th section of 13 Geo. 3. c. 78. that it is prosecuted by another than the justice presenting, if it be by his con-

sent. *The King v. The Inhabitants of Penderryn.* Page 260

9. Upon a *certiorari* to remove a conviction by a justice of peace on the deer act. 16 Geo. 3. c. 30. a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient; for justices ought in all cases to return convictions to the sessions, whether an appeal lies or not. *R. v. Eaton.* 285
10. No *certiorari* lies to remove an indictment on 30 Geo. 2. c. 24. s. 1. for obtaining money by false pretences. *The King v. Young.* 472
11. If a statute, creating an offence, give cognizance of it to one justice, with an appeal to the sessions, and take away the *certiorari* as to all the proceedings, and afterwards further powers for the punishment of the offender are given to the sessions by another statute, which does not take away the *certiorari*; the clause for taking away the *certiorari* in the former act cannot be extended to the proceedings under the latter. *R. v. M. Terrett.* 735
12. Therefore where there have been proceedings under both statutes, those under the former act cannot be removed, but those under the latter may. *ib.*

### CHARITY.

See VISITOR.

### CHARTER.

See CORPORATION. No. 7, 8.

### CLERK of ARRAIGNS.

See OFFICE. No. 4.

### CLERK of ASSIZE.

See OFFICE. No. 4.

### CLERK of the PEACE.

See COSTS. No. 4.

### COLLEGE.

See VISITOR.

### COMMITMENT.

See VAGRANT ACT. WARRANT.

### COMMON.



## INDEX TO THE PRINCIPAL MATTERS.

### COMMON.

See INCLOSURE.

### COMPOSITION.

1. An agreement, between a debtor and his creditors that they will accept a composition in satisfaction of their respective debts to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand. *Heathcote and Others v. Crookshanks. P. 24*
2. But if the debt had been ascertained by the agreement, and a fund provided, and all the creditors bound to forbear, it seems that would have been a good plea. *ib.*
3. So if the debtor had assigned over all his effects to a trustee in order to make an equal distribution amongst all his creditors, that would have been a good consideration in law for the promise. *ib.*
4. If all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects, by a deed of trust to which they are all parties; and one of them before he executes obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is void in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it will not maintain an action. *Cockshott v. Bennett. 763*

### CONDITIONS OF SALE.

See WARRANTY.

### CONSIGNMENT.

1. The consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the consignee: but if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is devested. *Lickbarrow v. Mason. 63*

### CONTINGENT Remainder.

See LIMITATION.

### CONVICTION.

See TROVER, No. 3, 4, 5, 6.

1. In a conviction on the 5 *An. c. 14. s. 4.* evidence "the defendant kept and used a gun to kill and destroy the game," was held sufficient. *R. v. R. Thompson. P. 18*
2. In a conviction, if the defendant appear and plead, and the evidence be given on the *same day*, the court will intend that the evidence was given *in the defendant's presence. ib.*
3. Where the conviction, after setting forth the evidence, stated "thereupon the defendant on *Ec. at, Ec. before me Ec.* by the oath of one credible witness, according to the form of the statute is convicted," it was held to be an adjudication by the justice, that he is *convicted of the offence. ib.*
4. Where justices of the peace are required by a penal statute to distribute the penalty on conviction among certain persons according to their discretion, an adjudication that the forfeiture be *disposed of as the law directs* is bad, and the court will quash the conviction. *R. v. Dimpsey. 96*
5. In such cases the justices ought to adjudge what the several proportions should be. *ib.*
6. A commitment by a justice of peace for a time certain, as for 14 days, under the vagrant act, 17 *G. 2. c. 5.* is a commitment in execution, and the party is not entitled to be bailed. *The King v. Brooke. 190*
7. Justices ought in all cases to return convictions to the sessions, whether an appeal lies or not, that the crown may not be deprived of its share of the forfeitures: and when that is done, a return of a copy to a *certiorari* is good. *The King v. Eaton. 285*

### COPYHOLD. Copyholder.

See INCLOSURE.

1. A *mandamus* to admit a copyholder, claiming by descent, refused, because he had a complete title against all the world but the lord without admittance. *The King v. Rennett. 198*
2. By



## INDEX TO THE PRINCIPAL MATTERS.

2. By a grant of a manor with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom. *Revell v. Jodrell.* Page 415
3. And after a grant of the soil of those wastes to trustees for the use of the copyholders in free socage, the lands when inclosed will be freehold, and not copyhold. *ib.* § 705
4. A copyhold cannot be created by operation of law, but must have been demised and demiseable by copy time out of mind. *ib.* § 705
5. If the lord of a manor refuse to admit a person to whom a copyhold is surrendered on account of a disagreement respecting the fine to be paid, the court will grant a *mandamus* to compel the lord to admit without examining the right to the fine; for no right to the fine can arise till admittance. *The King v. The Lord and Steward of the manor of Hendon.* 484
6. A covenant made by a copyholder with a stranger to assign and surrender his copyhold to him, which covenant is afterwards presented by the homage, does not give the lord any right to a fine. *ib.*
7. *A.* a copyholder covenants to assign and surrender to *B.* which covenant is presented by the homage, but before any surrender *B.* assigns his interest to *C.* to whom *A.* surrenders; *C.* has a right to be admitted on payment of a fine for his own admittance only. *ib.*
8. Where a copyhold is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew on the falling in of the lives, the copyholder cannot cut timber growing on the estate. *Mardiner v. Elliot.* 746
9. *Secus*, if the copyholder has a power of nominating his successors. *ib.*

### CORPORATION.

- See INFORMATION, No. 5. MANDAMUS, No. 1, 2, 3, 6. VISITOR, No. 8, 9, 10. QUO WARRANTO INFORMATION.
1. Where by the constitution of a corporation a person, having served a seven years

apprenticeship to a freeman residing in the town, is entitled to his freedom, and where by a bye-law the indentures must be enrolled by the town clerk within a certain time, an apprentice, who is bound to a freeman, resident only occasionally, and whose service is to be performed at another place, is not entitled to have his indentures enrolled; nor will the court grant a *mandamus* to the town clerk for that purpose. *R. v. Marshal.* Page 2

2. A jurat of the corporation of *Hastings* may be elected town clerk of that corporation. *Milward v. Thatcher.* 81
3. But the two offices are incompatible; and the acceptance of the latter, though an inferior office, will vacate the former. *ib.*
4. The court will not grant a criminal information against the members of a corporation for a misapplication of the corporation money; but it is rather a subject for an application to the court of chancery. *R. v. Watson.* 199
5. A judgment of seizure *quousque* &c. against a corporation, in default of appearance, operates as a *final judgment* to dissolve the corporation, if they do not appear in the same term, or the next at farthest. *R. v. Amery.* 515 to 569
6. The only use of a final judgment in such a case is to shew the crown's election to take advantage of the forfeiture: but any other matter of record, shewing the election, may equally answer the purpose. 568
7. Therefore a new charter of incorporation granted after that time to a new body of men in the same place is good, notwithstanding a charter of restitution be afterwards granted to the old corporation: and such charter of restitution is absolutely void. *ib.*
8. A power reserved to the crown in a charter of incorporation to amove, by order of council, *one or more* of the corporators, which charter also declared, that *all or any of them* so amoved should actually and without further process be amoved, and which also provided at the same time that upon such amotion the remaining corporators might proceed to fill up the vacancies, cannot



## INDEX TO THE PRINCIPAL MATTERS.

cannot be exercised to such an extent as not to leave a sufficient number to make a re-election; and therefore an amoval of all is illegal and void. *Page ib.*

### C O S T S.

1. A justice of the peace, who has prosecuted a gaoler to conviction for suffering a prisoner to escape committed by him on a charge of felony, is not entitled to the costs of the conviction under the 5 & 6 W. & M. c. 11. §. 3. *Rex v. Sharpness.* 47
2. But if he were to present a road, and the offender were thereon afterwards indicted and convicted, it seems he would then be entitled to costs as a public prosecutor within the act. *ib.*
3. So if he were to indict an inferior officer for disobeying an order made by him and convict him. *ib.*
4. The clerk of the peace, whose duty it is to draw up all presentments in the form of indictments, is a public prosecutor within the act. *ib.*
5. The prosecutor in a trial at bar is not within the act. *ib.*
6. *Qu.* whether the person really injured who is the real prosecutor be entitled to costs, if his name do not appear on the back of the indictment? *ib.*
7. On a defendant's acquittal on an information, he is not entitled under the 4 & 5 W. & M. c. 18. §. 2. to costs beyond the extent of the recognizance entered into by the prosecutor in 20*l.* under that act. *R. v. Filewood.* 45
8. But in that case the court intimated that in future it might be proper to adopt some new rule, such as refusing to grant any information, unless the prosecutor will undertake to pay all the costs. *ib.*
9. However in a subsequent case they refused to make such a rule; and said that the court, on granting an information, would not require the prosecutor to give security for the costs, in case the defendant should be acquitted, beyond the extent of the recognizance in 20*l.* required by 4 & 5 W. & M. c. 18. §. 2. *R. v. R. Brooke.* 190
10. Where some issues in the replevin are found for the plaintiff which entitle him to judgment, and some for the defendant,

the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the judge certify that the plaintiff had probable cause for pleading the matters on which those issues are joined. *Dodd v. Joddrell.* P. 235

11. Where after a recovery in ejectment, and before an action of trespass for mesne profits, the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict, in executing a writ of inquiry in the action for mesne profits, the Court refused to set aside the inquisition, because the plaintiff might have proved the costs as a debt under the defendant's commission of bankrupt. *Guliver v. Drinkwater.* 261
12. If one of several pleas pleaded by defendant be adjudged bad on a demurrer to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted from the costs taxed for the defendant upon the *postea*, if afterwards upon trial of the issues joined on the other pleas defendant should have a verdict; even tho' it should appear on the whole of the record that the plaintiff had no cause of action. *Duberley v. Page.* 391.
13. Under the 4 Ann. c. 16. the *quantum* only of the costs is left to the discretion of the court. *ib.*
14. After a nonsuit in trespass, the Court will stay proceedings in a second action between the same parties for the same cause until the costs of the nonsuit are paid, notwithstanding the plaintiff be a prisoner at the time of bringing the second action, and sue *in formâ pauperis.* *Weston v. Withers.* 511
15. So where the plaintiff was nonsuited in an action on the statute of bribery, the Court staid proceedings in a second action, for the same cause between the same parties, till the costs of the first were paid. *Moulton Q. T. v. Bingham.* *ib. n.*
16. The like in the case of an action for a malicious prosecution. *Baldwin v. Richards.* *ib. n.*

### C O V E N A N T.

See ASSUMPSIT, No. 12, 13.  
COPYHOLD, No. 6, 7.



## INDEX TO THE PRINCIPAL MATTERS.

1. A proviso in a lease for 21 years that the landlord shall re-enter on the tenant's committing an act of bankruptcy, whereon a commission shall issue, is good. *Roe dem. Hunter v. Galliers.* Page 133

### COUNTY.

1. No action will lie by an individual against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair. *Russell v. The Men of Devon.* 667

### CUSTOM.

See INCLOSURE. LANDLORD and TENANT, No. 9. STATUTES.

1. A custom for poor and indigent householders living in *A.* to cut and carry away the rotten boughs and branches in a chafe in *A.* cannot be supported, the description of the persons entitled being too vague. *Selby v. Robinson.* 758
2. And where the defendant justified, in trespass, under such a custom, which was found for him, the Court set aside the verdict on that issue, and entered a verdict for the plaintiff with nominal damages. *ib.*

### D.

### DEAD BODIES.

1. **T**AKING up dead bodies, even though for the purpose of dissection, is an indictable offence. *R. v. Lynn.* 733

### DEBT.

See PLEADING, No. 2.

1. In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution. *Bonafous v. Walker.* 126

### DEBTOR.

See PLEADING, No. 1.

### DECLARATION.

See ESSOIGN. PLEADING.

### DEED.

See ESTOPPEL. EVIDENCE, No. 1. LIMITATION.

1. Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and the deeds afterwards come into the vendee's possession on his taking a mortgage of the other part of the estate, and he then assigns the mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds. *Yea v. Field.* Page 708

### DEPRIVATION.

See VISITOR. OFFICE. No. 5.

### DEVISE.

See EJECTMENT. No. 2. LIMITATION. POWER.

1. *A.* being tenant for years of an house, gardens, stables and coal pen, bequeathed in the following words; "I give the house I live in and gardens to *B.*;" the stables and coal pen occupied by *A.* together with the house passed, without being expressly named, though the testator used them for purposes of trade, as well as for the convenience of his house. *Doe v. Collins.* 498
2. By a bequest of an house, it is in general to be presumed that the testator meant to pass every thing which was occupied by him with it, as proper and convenient for the occupation of the house, though the word *appurtenances* be not added. 502
3. The word "estates" in a will will carry the fee, unless coupled with other words which shew a different intention. *Fletcher v. Smiton.* 656
4. The word "estates" is equivalent to "estate." *ib.*

### DILAPIDATIONS.

1. An action on the case for dilapidations of a prebendal house may be maintained by a succeeding



## INDEX TO THE PRINCIPAL MATTERS.

succeeding prebendary against his predecessor. *Radcliffe v. D'Oyly.* Page 630

2. The statutes of the church of *Ely* provide that the receiver shall require the prebendaries to repair their houses when necessary, and upon their default repair them at their costs; but the materials are to be supplied out of the funds belonging to the church, and the charges of the workmanship only are to be borne by the prebendaries; on a question whether a succeeding prebendary should recover against his predecessor the full estimate of repairs wanting, or the amount of the workmanship only, the Court thought it reasonable that he should recover the amount of the workmanship only; and held that the church were still bound to supply the materials. *ib.*

### DISTRESS.

See LANDLORD and TENANT, No. 9.

### DOMUS.

See VISITOR.

### DYER.

The marginal notes in *Dyer's* reports are good authorities, being written by *Ld. Ch. Jus. Treby.* *Milward v. Thatcher.* per *Buller J.* 84

### E.

### EJECTMENT.

See TURNPIKE, No. 2. EVIDENCE, No. 2, 3. PRACTICE, No. 44. RECTOR, No. 3.

1. Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. *Maddon dem. Baker v. White.* 159
2. If there be an agreement before marriage that a settlement shall be made of the wife's estate, reserving to her a power of disposing of it, which agreement is signed by the intended husband and wife but not sealed; and before the marriage the wife

disposes of it to the husband who survives her and devises the estate by will; the title of his devisee is such a doubtful equity as cannot be set up in an ejectment against the title of the wife's heir at law. *Dem. Hodsdon v. Staple.* Page 684

3. A satisfied term may be presumed to be surrendered, but an unsatisfied term, raised for the purpose of securing an annuity, during the life of the annuitant cannot, and may be set up as a bar to the heir at law, even though he claim only subject to the charge. *ib.*

### ELECTION.

See VISITOR.

### ELY CHURCH.

See DILAPIDATIONS, No. 1, 2.

### ERROR, Bail in.

See PRACTISE, No. 7, 8, 11, 12, 13, 14, 40.

### ERROR, Writ of.

See PRACTICE.

1. On writs of error, the question whether the Judges below were properly constituted cannot be entered into: it is sufficient that they were Judges *de facto* in a court having jurisdiction of the subject matter. *Milward v. Thatcher.* 87

### ESCAPE.

See BAILIFF, No. 2.

1. In debt against a sheriff or gaoler for an escape, the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution. *Bonafous v. Walker.* 126
2. An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner who is in execution on a judgment obtained by her as administratrix. *ib.*
3. A voluntary return of a prisoner, after an escape, before action brought, is equal to a re-



## INDEX TO THE PRINCIPAL MATTERS.

a retaking on a fresh pursuit: but it must be pleaded. Page 126

4. Under a count for a *voluntary* escape, the plaintiff may give evidence of a negligent escape: and the defendant may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. ib.

5. An escape from the rules of the King's Bench prison, without the marshal's knowledge, is not a voluntary escape. ib.

6. The bailiff of a liberty, who has the return and execution of writs, is liable to an action of debt for an escape, if he remove a prisoner taken in execution to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff. *Boothman v. The Earl of Surry.* 5

### E S S O I G N.

1. If on the return of a writ in a personal action the defendant cast an *essoign*, which is not adjourned to a particular day, and it is not quashed, and the plaintiff deliver his declaration on the first day of the following term, the defendant is not entitled to an *imparlance*. *Rooke v. The Earl of Leicester.* 16
2. When a corporation are defendants, they are not entitled to an *essoign*. *Argent v. The Dean and Chapter of St. Pauls.* [cited in] 16
3. There cannot be an *essoign* in a personal action. ib.
4. Where an *essoign* is not adjourned to a particular day, and no motion made to quash it, the declaration cannot be delivered till the first day of the term. ib.

### E S T A T E.

See DEVISE. LIMITATION.

1. The word "estates" in a will will carry the fee, unless coupled with other words which shew a different intention. *Fletcher v. Smiton.* 656
2. The word "estates" is equivalent to "estate." ib.

### E S T O P P E L.

1. In general the grantor is estopped by his deed to say he had no interest. *Fair-title dem. Mytton v. Gilbert.* Page 171
2. But that principle does not apply where the grantor is a trustee for the public. ib.
3. Still less can it apply where the trustee, deriving his authority under a public act of parliament, grants that which the act does not empower him to do. ib.

### E S T O V E R S.

See INCLOSURE.

### E V I D E N C E.

See CONVICTION, No. 1, 2. *Venire de Novo*, No. 1. TRESPASS, No. 3. PLEADINGS, No. 6. WITNESS. RECEIPT, No. 1. FORGERY.

1. A deed, coming out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, and will be received in evidence without proof of the execution. *R. v. The Inhabitants of Middlezey.* 41
2. Declarations by tenants are admissible evidence after their death, to shew that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it not resisted by contrary evidence is decisive. *Davies v. Pierce.* 53
3. Where the plaintiff claimed as devisee in remainder under a will 27 years ago, under which there was no possession, declarations by the tenant, who was in possession at that time that he held as tenant to the devisor, are admissible evidence to prove seisin in the devisor. *Holloway v. Rakes.* 55
4. There is no difference between civil actions and criminal prosecutions as to the evidence of papers. In neither case is the party bound to produce evidence against himself; but even in a criminal prosecution notice may be given to him to produce papers in his possession, and in case of his refusal or



## INDEX TO THE PRINCIPAL MATTERS.

or neglect, other evidence may be given of their contents. *The Attorney General v. Le Merchant, Excheq.* Page 201 n.

5. And notice to the defendant's agent or attorney in such case is sufficient. *ib.*
6. Where a defendant in a prosecution had suffered judgment to go by default, and came up to receive judgment, the prosecutor was permitted to read affidavits in aggravation, containing expressions made use of by the defendant confirming and aggravating his guilt, which had been uttered by him in the hearing of two persons, and by them afterwards related to the persons making affidavits, the prosecutor having first entitled himself to this evidence by swearing to an application to both those persons to come forward with their testimony, which they had refused, and it appearing to the court that those witnesses were under the control of the defendant. *The King v. Archer.* 203. n.
7. The court will not grant a *certiorari* to remove the land-tax assessments: but if an information be moved for against the commissioners of the land-tax, the court will admit an attested copy of the assessment as evidence instead of the original. *The King v. King and Others.* 234
8. A letter, written by a defendant (who pleaded the statute of limitations to an action of *assumpsit*,) to the plaintiff's attorney on being served with a writ, couched in ambiguous terms, neither expressly admitting or denying the debt, should be left to the jury to consider whether it amounts to an acknowledgment of the debt, so as to take it out of the statute of limitations. *Lloyd v. Maund.* 760
9. Where two parties had betted upon a certain event, to ascertain which it was necessary to inspect the public revenue books, and the proper officer was served with a *subpœna duces tecum*; Lord Mansfield, and Mr. Justice Ashburst, severally held at *nisi prius* that the officer was not bound to produce them. 616

### EXCEPTIONS, *Bill of.*

1. If there be a bill of exceptions to the rejection of evidence in the court of great

sessions in *Wales*, and upon error in *B. R.* the evidence is deemed admissible, the court of *B. R.* will award a *venire de novo* into the next *English* county. *Davis v. Pierce.* Page 125.

## E X C I S E.

1. A person, who intends to become a dealer in foreign wine, must take out his licence, and enter his warehouse, before he lays in his stock; and a dealer in wine is not entitled to a permit to remove wine fold, which wine was laid in before he took out his licence. *The King v. The Commissioners of Excise.* 381
2. *Dealing* means *buying* in 26 G. 3. c. 59 *ib.*
3. A *mandamus* will lie to the commissioners of excise to grant a permit, if a proper case be laid before the court. *ib.*
4. The court will not prevent the officers of the revenue from seizing goods in dispute. *ib.*
5. No appeal lies to the sessions from a conviction of two justices for an offence under 25 G. 3. c. 72. s. 9. against printing cotton before it is measured &c. notwithstanding it contains a general clause of reference to all former excise laws, and incorporates all the powers &c. provided by 12 Car. 2. c. 24. or by any other law relating to the excise, or inland duties under the management of the commissioners of excise, for managing, mitigating, or adjudging, the duties or penalties granted by this act. *The King v. The Justices of Surrey.* 540
6. The clauses of reference in the excise laws to former laws can only be taken to extend to the general powers and provisions of such acts, and not to every special clause. *ib.* 510
7. The distinction is between the laws of excise properly so called, and those acts for raising inland duties under the management of the commissioners of excise. *ib.*

## E X E C U T I O N.

See PRACTICE, No. 16. SHIP, No. 3.

1. The court will not set aside an execution sued out before, but executed after, the allowance of a writ of error served on the sheriff and the party, if the plaintiff in



## INDEX TO THE PRINCIPAL MATTERS.

- error has not regularly put in bail. *Lane and Others v. Bacchus.* Page 44
2. *Secus*, if the plaintiff in error had regularly put in bail. *ib.*
  3. In actions on simple contracts and judgments for a *debt certain*, the expences of levying must be paid by the plaintiff; so that if the sheriff overcharge, the plaintiff is the party grieved under 29 *Eliz. c. 4.* which limits sheriff's fees: but if the judgment be for a *penalty*, the defendant must pay the expences of levying, and is the party grieved if the sheriff overcharge. *Woodgate v. Knatchbull.* 157
  4. Nothing but the poundage can be taken by the sheriff under 29 *Eliz. c. 4.* for levying an execution. *ib.* 148
  5. Where a person, against whom a writ of *fi. fa.* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable therefrom, the sheriff is warranted in returning *nulla bona* if it appear that the memorial of such annuity was not registered according to the directions of the annuity act, 17 *Geo. 3. c. 26. s. 1.* for in that case the deed is absolutely void. *Crofsley v. Arkwright.* 603
  6. If plaintiff recover a judgment against two defendants in *B. R.* and one of them bring a writ of error in *Cam. Scacc.*, the plaintiff cannot charge the other defendant in execution, till the record be remitted into the court of *B. R.*, notwithstanding the writ of error might have been quashed immediately, because not brought by both defendants. *Laroche v. Wasborough and Another.* 737
  7. In such case, where the judgment was affirmed in *Cam. Scacc.* and costs given of the writ of error, and both the defendants were taken under a writ of execution on the whole sum, including the costs of the writ of error as well as the original sum recovered, this court permitted the plaintiff to amend his writ of execution as to the defendant who did not join in the writ of error, by altering it to the original sum recovered. *ib.*

### EXECUTOR and ADMINISTRATOR

See PLEADING, No. 16.

1. An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner who is in execution on a judgment obtained by her as administratrix. *Bonafous v. Walker.* P. 126

### EXECUTOR *de son tort.*

1. What acts make a person liable as *executor de son tort* is a question of law: the jury are to say whether the acts be sufficiently proved. *Padget v. Priest.* 97
2. The slightest circumstance of intermeddling with the intestate's goods will constitute a man an *executor de son tort.* *ib.* 597
3. Therefore if *A.* the servant of *B.* sell the goods of *C.* an intestate, as well after his death as before, though by the orders of *C.*, and pay the money arising therefrom into the hands of *B.*, *B.* may be sued as an *executor de son tort.* *ib.*
4. If a person, having intermeddled in the intestate's affairs, has money belonging to him in his hands at the time when an action is brought against him as *executor* for a debt due from the intestate, he is liable as an *executor de son tort.* *ib.*
5. If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued as *executor de son tort* for the debts of the deceased; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors. *Edwards v. Harben.* 587

F.

### FACTOR.

See INSURANCE, No. 4, 5, 6, 7, 8, 9, 10.

### FALSE IMPRISONMENT.

See PLEADINGS, No. 7, 8, 9, 10.

1: It



## INDEX TO THE PRINCIPAL MATTERS.

1. It is a justification to the bailiff against an action of false imprisonment that he retook a prisoner before the return of the writ on mesne process, though he had voluntarily permitted him to go at large after the first arrest. *Atkinson v. Matteson.* Page 172
2. Where a justice of peace maliciously issues a warrant against another, without any information being laid before him, upon a supposed charge of felony, the remedy against the justice is *trespass* for the false imprisonment, and not *case*. *Morgan v. Hughes.* 225
3. The distinction is this; where the immediate act of imprisonment proceeds from the defendant, the remedy is by action of trespass only: But where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy. *ib.* 231

### FALSE PRETENCES.

See CERTIORARI, No. 10. INDICTMENT, No. 6.

### FELONY.

See TROVER, No. 3, 4, 5, 6.

1. Persons receiving any goods &c. belonging to a vessel in the *Thames*, knowing the same to have been stolen, may be prosecuted for felony under the 2 Geo. 3. c. 28. *Rex v. Wyer.* 77
2. Although it be not necessary to state in a warrant of commitment for felony that the act was done *feloniously*; yet unless it sufficiently appear to the Court that a felony has been committed, they are bound to bail the defendant. *The King v. Judd.* 255
3. Setting fire to a parcel of unthreshed wheat is not a felony within 9 Geo. 1. c. 22. *ib.*

### FEME COVERT.

See EJECTMENT, No. 2. AGREEMENT, No. 3.

### FINE.

See CERTIORARI, No. 4. COPYHOLD, No. 5, 6, 7.

### FORFEITURE.

See LANDLORD and TENANT, No. 3, 4, 5.

### FORGERY.

1. In an indictment for forging a bill of exchange, all the judges held that it need not be stamped in order to be received in evidence, though by 23 G. 3. c. 49. imposing a duty on such instruments, it is said that no bill of exchange shall be received in evidence unless it be first duly stamped. *R. v. Hawkefwood.* E. 23 G. 3. Page 606

### FOUNDATION.

See VISITOR.

### FRAUDS.

See BILL of SALE.

### FRAUDS. Statute of.

1. If the person, for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the stat. of frauds. *Matsen v. Wharam.* 80
2. There is no distinction between a promise to pay for goods furnished for the use of another made before they are delivered, and one made after. *ib.*
3. A promise in the words, "If you do not know him you shall see him, and I will see you paid," not being in writing, is void by the statute of frauds. *ib.*
4. So is this, "you must see my mother in law with bread, and I will see you paid." *Jones v. Cooper.* cited, and also in *Cowp.* 227.

### FREIGHT.

See INSURANCE, No. 14. LIEN, No. 1.

### G.

### GAME.

1. IN a conviction on the 5 Ann. c. 14. s. 4. evidence, "that the defendant kept and used a gun to kill and destroy the game," was held sufficient. *R. v. Thompson.* 18

### GAMING.



## INDEX TO THE PRINCIPAL MATTERS.

### G A M I N G.

See PLEADING, No. 13.

### G O O D S.

1. Goods delivered to a person claiming them wrongfully, who pays freight, and other charges, cannot be detained for those expenses against the rightful owner. *Lempriere v. Pasley.* Page 485

### G O O D S at S E A.

See BILL of Lading.

### G O O D S S T O L E N.

See TROVER, No. 3, 4, 5, 6.

### G R A N T.

See INCLOSURE, No. 3.

### G U E R N S E Y.

See STATUTES.

### H.

### H I G H W A Y S.

See TURNPIKE. PRESENTMENT.

1. The parish at large are *primâ facie* bound to repair all highways lying within it, unless by prescription they can throw the onus on particular persons by reason of their tenure. *R. v. The Inhabitants of Sheffield.* 106
2. If the inhabitants of a township, bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish. *ib.*
3. If trustees under a road act turn a road through an inclosure, and make the fences at their own expence, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special provision in the act to that effect. *The King v. The Commissioners of the Llandillo district, &c.* 232
4. What is meant by a road in the act is the surface over which the subjects have a

right to pass, and not the fences on each side. Page 232

5. The owners of the land are bound to repair the fences on each side, unless otherwise provided by the act. *ib.*
6. It is no objection to a *certiorari* to remove a presentment of a road made by a justice of peace under 13 Geo. 3. c. 78. s. 24. that it is prosecuted by another than the justice presenting, if it be by his consent. *The King v. The Inhabitants of Penderryn.* 260

### H O R S E.

See WARRANTY.

### H U S B A N D and W I F E.

See BARON and FEME.

### I.

### I N C L O S U R E.

1. **T**HE lord has no right under the statute of *Merton* to inclose and approve the wastes of a manor, where the tenants of the manor have a right to dig gravel on the wastes, or to take estovers there. *Dubberley v. Page.* 391
2. A custom in a manor, that any person being desirous of inclosing may apply to the court &c. first obtaining the consent of the lord, does not abridge the lord's common law right of inclosing without any such application, provided he leave a common sufficient for the tenants. *ib.* 392 n.
3. By a grant of a manor with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom; and after a grant of the soil of those wastes to trustees for the use of the copyholders in free socage, the lands when inclosed will be freehold and not copyhold. *Revell v. Jodrell.* 415
4. Where by the terms of an inclosure act, for inclosing the wastes of a manor, a certain portion was to be made to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the several tenants in fee, discharged from all customary



## INDEX TO THE PRINCIPAL MATTERS.

customary tenures, &c. a saving clause, reserving to the lord of the manor all seignories incident to the manor, and all rents, fines, services, &c. and all other royalties and manerial jurisdictions whatever, will not reserve mines under those allotments to the tenants, though it appear that there was a subsisting lease of such mines at the time the act passed, granted by the lord of the manor. *Townley v. Gibson.* Page 701

### INDICTMENT.

See PRESENTMENT, No. 1, 2.

1. An indictment charging the defendant with obtaining money by *false pretences* is insufficient, if it do not shew what the false pretences were; and such a defect is a sufficient ground for reversing a judgment against the defendant. *R. v. Mason.* 581
2. Taking up dead bodies, even though for the purpose of dissection, is an indictable offence. *R. v. Lynn.* 733

### INFANT.

See ASSUMPSIT, No. 16.

EJECTMENT, No. 1.

1. If an agreement, made by an infant, be for his benefit at the time, it shall bind him. *Maddon dem. Baker v. White.* 159

### INFORMATION.

See QUO WARRANTO INFORMATION.

SHERIFF, No. 13.

1. A commitment by a justice of peace for a time certain, as for 14 days, under the vagrant act, is a commitment in execution, and the party is not entitled to be bailed: and if another magistrate on illegal and corrupt motives discharge a person so committed, the court will grant an information against him. *The King v. R. Brooke.* 190
2. The court on granting an information will not require the prosecutor to give security for the costs, in case the defendant should be acquitted, beyond the extent of the recognizance required by 4 & 5 W. & M. c. 18. s. 2. *ib.*

3. A party applying for an information must wave his right of action: but if the court, on hearing the whole matter, are of opinion that it is a proper subject for an action, they may give the party leave to bring it. *The King v. Sparrow.* Page 198

4. The court will not grant a criminal information against the members of a corporation for a misapplication of the corporation money. *The King v. Watson.* 199
5. An order made by a corporation and entered in their books, stating that *A. B.* (against whom a jury had found a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in *C. B.*) was actuated by motives of public justice &c. in preferring the indictment, is such a libel reflecting on the administration of justice, for which the court will grant an information against the members making that order. *ib.*
6. The court will not grant a *certiorari* to remove the assessments of the land-tax: But if an information be moved for against the commissioners of the land-tax, the court will admit an attested copy of the assessment as evidence instead of the original. *The King v. King and Others.* 234

### INQUIRY, Writ of.

See BANKRUPT, No. 15. COSTS, No. 11.

### INSOLVENCY.

See CONSIGNMENT, No. 1.

### INSANITY.

1. The court will not discharge a defendant out of custody on filing common bail on the ground that he has become insane since the arrest. *Kernot v. Norman.* 390

### INSURANCE.

1. If a ship insured for a certain time fail before the time on a different voyage from that insured, the assured cannot recover, though she afterwards get into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached. *Way v. Modigliani.* 30



## INDEX TO THE PRINCIPAL MATTERS.

2. When a ship is insured from one port to another, the policy does not attach, unless she sail *on the voyage insured*. Page 30
3. Every re-assurance in this country either by *British* subjects or *Foreigners*, whether on *British* or *Foreign* ships, is void, by 29 *Geo. 2. c. 37. s. 4.* unless the assurer be insolvent, become a bankrupt, or die. *Andree v. Fletcher.* 161
4. If a merchant abroad, interested in goods and the freight of a cargo, mortgage them to his correspondent in *England* for payment of money at a certain day, and by letter inclosing the bills of lading direct him to insure, the latter having accepted the bills of lading will be liable to an action for not insuring, notwithstanding the mortgage was become absolute before the order was received. *Smith v. Loscelles.* 187
5. A merchant abroad, having effects in the hands of his correspondent in *England*, has a right to call upon him to make an insurance for him. *ib.*
6. If a merchant in *England* has been used to procure insurances for his correspondent abroad, in the usual course of trade, the latter has a right to expect compliance with an order for insurance from the former, although he has no effects in his correspondent's hands, unless some previous notice be given to the contrary. *ib.*
7. If a merchant abroad send bills of lading to his correspondent here, and at the same time give directions for procuring insurance, the latter cannot accept the bills of lading without obeying the orders to insure. *ib.*
8. Where a merchant here had accepted an order for insurance, and limited the broker to too small a premium, in consequence of which no insurance could be procured, he was held liable to make good the loss to his correspondent. *Wallace v. Telfair.* Sitt. af. Tr. at G. H. 1786. 188 n.
9. If a merchant residing in *London*, who has received an order for insurance from his correspondent, does what is usual to get the insurance effected, as if he applies to *Lloyd's* without effect, he is not bound to send to any other place for that purpose;

- though it may be doubtful whether he ought not to apply to the public insurance offices in *London*, if it be customary to make application to them in such cases. *Smith v. Cologan,* Sitt. after Tr. at G. H. 1786. Page 188. n.
10. But if the merchant in such case do not apply to the public offices, but send to *Newcastle* or any other port, and do the best he can, he is not answerable for the subsequent ill conduct of the insurer; and more especially if the principal adopt his acts even for a moment. *ib. n.*
  11. Where repairs are ordered by the underwriters, for the payment of which a bottomry bond is given, and they refuse to pay it on the arrival of the ship, in consequence of which she is sold, they are liable for all the damage which shall accrue to the owner in consequence of that refusal. *Da Costa v. Newnham.* 407
  12. Where a ship has been repaired, the underwriters are not entitled to the usual deduction of one third, new for old, unless the ship has been put into the free possession of the owner again. *ib.*
  13. Where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. *ib.*
  14. Freight must contribute to general average. *ib.* 408
  15. Where a ship has been forced by a storm to enter a port in order to repair, and cannot continue her voyage without apparent risk of being lost, the wages and provisions of the crew are to be brought into an average from the day it was resolved to seek such port to the day of departure from it; with all the charges of loading, and every other expence incurred by that necessity. So said in *Beawes*, and seems to have been approved by Lord *Mansfield*, but never determined. *ib.* 414

### INTEREST.

See BAIL IN ERROR, No. 1, 2, 3.

1. Where



## INDEX TO THE PRINCIPAL MATTERS.

1. Where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expences beyond the amount of 5*l.* per cent. if such charges are reasonable, warranted by usage, and not made a colour for usury. *Auriol v. Thomas.* Page 52
2. The charge of 10*s.* per pagoda on a bill returned protested from *India* is not excessive, though it was taken in payment here at the rate of 6*s.* 6*d.* per pagoda. *ib.*
3. Where it appeared to be the usage of country bankers in discounting bills to receive, over and above the common interest of 5*l.* per cent. for the time the bills had to run, the further sum of 5*s.* per cent. on the gross sum for commission; such charge was held to be legal. *Winch 2. T. v. Fenn.* 52 *n.*
4. In debt upon recognizance bail in error in the Exchequer Chamber are not liable to pay interest on the judgment between the signing of the judgment in *B. R.* and the affirmance of it in *Cam. Scacc.* *Frith. v. Leroux.* 57
5. But they are liable for interest due subsequent to the affirmance. *ib.*
6. The Court will not direct the master to include interest in the costs to be taxed on non-prossing a writ of error returnable in Parliament for want of transcribing. *Cumming v. Hanforth.* 58
7. In debt on a judgment affirmed in error, the jury by way of damages may give interest upon the sum recovered by the judgment from the time of signing it, where by the practice of the Court in which error is brought, such interest is not allowed in costs upon the affirmance. *Entwistle v. Shepherd.* 78  
*In act. on bond, damages may be recovered beyond penalty. — 8. Lonsdale & Co. v. Church. 300.*

### JOINT ACTION.

1. **T**HE plaintiffs together with *A.* and *B.* being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which was paid solely by the plaintiffs,

*A.* and *B.* having in the mean time become bankrupts: an action cannot be brought by the plaintiffs alone for a moiety of the restitution money and of the costs, because it was either a partnership transaction, when *A.* and *B.* ought to be joined; or not, when separate actions should be brought by each of the persons paying. *Graham v. Robertson.* Page 282

### JUDGES.

See ERROR, No. 1.

### JUDGMENT.

See CORPORATION, No. 5, 6, 7. PRACTICE, No. 45.

### JUDGMENT ARRESTED.

See PLEADING, No. 18. WAGER, No. 1, 2.

### JURISDICTION.

See ADMIRALTY. AWARD, No. 2.

1. If an affidavit be filed without any title, the Court cannot take any notice of it, though the adverse party is willing to waive the objection. *Owen v. Hurd.* 644
2. Where it appears that the Court have no jurisdiction, they will not go into the merits. *ib.*

### JURY.

See VERDICT.

### JUSTICE of PEACE.

See VAGRANT ACT. INFORMATION. No. 1. HIGHWAYS, No. 6. CERTIFICATE.

1. A justice of peace who has prosecuted a gaoler to conviction for suffering a prisoner to escape committed by him on a charge of felony is not entitled to the costs of the conviction under 5 *W. & M. c.* 11, *s.* 3. *The King v. Sharpness.* 47
2. But if he were to present a road, and the offender were indicted thereon afterwards and convicted, it seems he would then be entitled to costs, as a public prosecutor within the act. *ib.*



## INDEX TO THE PRINCIPAL MATTERS.

3. So if he were to indict an inferior officer for disobeying an order made by him.] *P.* 47
4. Where a justice of peace maliciously grants a warrant against another, without any information, upon a supposed charge of felony, the remedy by the party grieved is trespass for the false imprisonment and not case. *Morgan v. Hughes.* 225
5. The practice of one magistrate's granting a *superfedeas* to the warrant of another without any formal and legal examination is unwarrantable. *The King v. R. Brooke.* 190
6. If a tenant hold under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he came of age, the son must make his election in a reasonable time after he comes of age. *Doe v. Smith.* Page 436
7. The delay of a year is unreasonable, and the tenant cannot be ejected upon a half year's notice to quit, served after such a delay. *ib.*
8. If he had elected within a week or fortnight, that certainly would have been reasonable. *ib.*
9. If a trader, after committing an act of bankruptcy, take a house and agree to pay half a year's rent in advance, where, by the custom of the country, half a year's rent becomes due on the day on which the tenant enters; the landlord, after an assignment under the commission, and before the year expires, may distrain the goods on the premises for half a year's rent; or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent. *Buckley v. Taylor.* 600

*Kenyon, made ch. j. 6A2.*  
KING'S BENCH PRISON.

See RULES of the Prison.

L.

### LAND-TAX.

See CERTIORARI, No. 6. INFORMATION, No. 6.

### LANDLORD AND TENANT.

1. **A** Proviso in a lease for 21 years that the landlord shall re-enter on the tenant's committing an act of bankruptcy, whereon a commission shall issue, is good. *Roe v. Galliers.* 133
2. Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice as the original lessor must have given. *Maddon v. White.* 159
3. If a lease contain a proviso that the lessee, his executors, &c. shall not set, let, or assign over, the whole or part of the premises without leave in writing, on pain of forfeiting the lease; the administratrix of the lessee cannot underlet without incurring a forfeiture, though for less time than the whole term. *Roe v. Harrison.* 425
4. A parol licence to let part of the premises does not discharge the lessee from the restriction of such a proviso. *ib.*
5. The lessor's receiving rent after the forfeiture is no waiver, unless the forfeiture were known to him at the time. *ib.*

### LEASE.

See LANDLORD and TENANT. RECTOR.

1. An instrument on an agreement stamp, reciting that *A.* in case he should be entitled to certain copyhold premises on the death of *B.* would immediately demise the same to *C.* declaring that *he did thereby agree to demise and let the same*, with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Doe v. Clare.* 739

### LIBEL.

1. An order made by a corporation and entered in their books, stating that *A. B.* [against whom a jury had found a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in *C. B.*] was actuated by motives of public justice, &c. *in*



## INDEX TO THE PRINCIPAL MATTERS.

in preferring the indictment, is such a libel, reflecting on the administration of public justice, for which the Court will grant an information against the members making that order. *The King v. Watson.*  
Page 199

### LICENCE.

See LANDLORD and TENANT, No. 4.  
TRESPASS, No. 4.

### L I E N.

See PLATE, No. I.

1. Goods delivered to a person, claiming them wrongfully, who pays freight, and other charges, cannot be detained for those expences against the rightful owner. *Lempriere v. Pasley.* 485

### LIMITATION.

See DEVISE.

1. Where the testatrix, by virtue of a settlement had an estate for life, with a power to dispose of 1000 l. in case J. W. or any issue of his should be living at her death out of a term of 500 years vested in trustees, with remainder to J. W. for life, and then to his sons and daughters in tail, with remainder to herself in fee; and, reciting the settlement and power, devised the said sum of 1000 l. to trustees for certain purposes, if J. W. or any of his issue should be living at the time of her death, and then devised that, in case neither the said J. W. nor any issue of his body should happen to be living at the time of her decease, by which event the said manor, by virtue of and under the limitations in the said deed of settlement &c. would devolve upon her and her heirs, she gave the premises to the same trustees for 500 years to raise the said 1000 l. immediately after her decease, and within six months after to raise a further sum of 1000 l. and from and after the determination of the said term, and subject thereto, devised the premises to her mother for life, remainder to her own daughter in fee, remainder over to A. W. in fee, in case her

daughter should die before 21, or without issue; the contingency of J. W. or any of his issue not being living at the time of the testatrix's death is annexed to all the subsequent limitations; and, he having survived the testatrix, the heir at law of the testatrix and her daughter, who died before 21 and unmarried, is entitled to the estate against A. W. the remainder man in fee under the will. *Doe v. Wilkinson.* Page 209

2. If an estate be limited by deed to husband and wife, and the heirs on the body of the wife by the husband to be begotten, both have an estate tail. *Denn. v. Gillot.* 431
3. But if the remainder be limited to the heirs of the body of the wife by the husband to be begotten, the estate tail vests in the wife solely. *ib.*
4. Where there is an estate limited to a person for life, with remainder to the heirs of the body of the same person, it is an estate tail: but the limitation of the remainder must be to the heirs of the body of that person alone; therefore, if an estate be limited to A. for life, remainder to the heirs of the bodies of A. and B. it is not an estate tail. 435
5. Where R. Frank on the marriage of his son levied a fine to the use of himself, during the joint lives of himself and his son, and after the decease of either to the use of S. Cotele for life, and after her decease to the use of the issue male of her and his son, and the heirs of their bodies, and in default thereof to the use of the heirs to be begotten on the body of Susan by his son, remainder to his own right heirs, and S. C. died leaving only 5 daughters, on the death of R. F. a question arising as to what estate his son took, it was resolved, 1st, That if he had been joint tenant with the wife for life, this had been an estate tail in both, as the word "heirs" is not applied to any body particularly. 2dly, that neither husband or wife had an estate tail; not the husband, because he had no prior estate for life; nor the wife, because, though she took an estate for life, yet the heirs are not applied to her body alone, and 3dly, That it was a contingent remainder to the heirs of both their bodies. *ib.*



## INDEX TO THE PRINCIPAL MATTERS.

6. A devise to trustees in trust to receive rents and profits during the life of *A.* and that such rents and profits shall be applied for the subsistence and maintenance of the said *A.* during his life, is not an use executed in *A.* and cannot unite with a subsequent legal limitation to the heirs of the body of *A.* *Silvester v. Wilson.* Page 444
7. If a term be bequeathed to "*A.* and his lawful heirs, and if he die and leave no lawful heirs, then to *B.*" the limitation to *B.* is good. *Goodtitle and Peake v. Pegden.* 720

### LIMITATIONS, STATUTE OF.

See PRACTICE, No. 23.

1. A letter, written by a defendant (who pleaded the statute of limitations to an action of assumpsit) to the plaintiff's attorney on being served with a writ, couched in ambiguous terms, neither expressly admitting or denying the debt, should be left to the jury to consider whether it amounts to an acknowledgment of the debt, so as to take it out of the statute of limitations. *Lloyd v. Maund.* 760

### LIQUIDATED DAMAGES.

See SET-OFF, No. 1.

### LOTTERY.

See AFFIDAVIT, No. 6.

1. The sale of lottery tickets, by which the purchaser is to be entitled to all the benefit of them, *except the 10 l. prizes*, is prohibited and made void by the 22 Geo. 3. c. 47. *Deery v. Shee.* 617
2. Since that act no interest in any ticket can be conveyed less than the whole of the specific ticket or share; and those shares not less than sixteenths. *ib.*

### M.

### MALICIOUS PROSECUTION.

See CASE, *Action on the*, No. 1, 2, 3, 4, 5.  
FALSE IMPRISONMENT, No. 2, 3. PLEADING, No. 8.

1. **T**HE grounds of an action for a malicious prosecution are, 1st, That it was done maliciously; and 2dly, Without probable cause. *Morgan v. Hughes P.* 231

### MANDAMUS.

See APPRENTICE, No. 1. CORPORATION.  
EXCISE.

1. A mandamus refused to restore to the office of clerk of the Bridge-house estates in *London*, though the party was irregularly suspended, it appearing on his own shewing that there was good ground for the suspension, if the proceedings had been regular. *The King v. The Mayor of London.* 177
2. Such office being an ancient office for life, the duty of which is to superintend certain estates which are appropriated by the corporation to the support of *London* bridge, some of those estates having been granted to them for that express purpose, a mandamus lies to restore to it. *ib.*
3. A mandamus granted to restore to the office of clerk or surveyor of the city works; (*Hil. 6 Geo. 2.* there cited,) which was also an office for life, on receiving which an oath was administered. *ib.*
4. A mandamus to the steward of a manor to admit a copyholder, claiming by descent, refused. *The King v. Rennett.* 197
5. If trustees under a road act turn a road through an inclosure, and make the fences at their own expence, and repair them for several years, the Court will not compel them by mandamus to continue such repairs, unless there be a special provision in the act to that effect. *The King v. The commissioners of the Llandillo district, &c.* 232
6. A mandamus to the mayor of *Colchester* to admit a recorder of that borough refused, because there was a recorder *de facto*, and the parties had another remedy by *quo warranto*; though both of them claimed under the same election. *The King v. The Mayor of Colchester.* 259
7. A mandamus lies to a visitor to hear an appeal, and give some judgment. *R. v. The Bishop of Lincoln.* 338. n.
8. If



## INDEX TO THE PRINCIPAL MATTERS.

8. If a return to a *mandamus* consist of several independent matters, not inconsistent with each other, but part of them good in law and part bad, the court may quash the return as to such part only as is bad, and put the prosecutor to plead to or traverse the rest. *The King v. The mayor &c. of Cambridge.* Page 456

9. Where two causes returned are inconsistent, the whole is bad. *ib.*

10. That *A.* was not a burgess; that he was not eligible to the office of common council man; and that he was not elected, are not inconsistent returns. *ib.*

11. A *mandamus* may be granted under 11 Geo. 1. c. 4. to proceed to the election of an annual officer in a corporation, as well as to the head officer. *The case of the Corporation of Scarborough, cited in R. v. J. Woodrow.* 732

### M A N O R.

See INCLOSURE. COPYHOLD.

1. By a grant of a manor with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom. *Revell v. Fordrell.* 415

### M A R K E T - O V E R T.

See TROVER, No. 3, 4, 5, 6.

### M A R R I A G E.

See WITNESS, No. 1, 2, 3.

### M A R R I A G E S E T T L E M E N T.

See EJECTMENT, No. 2.

### M I N E S.

See INCLOSURE, No. 3.

### M O N E Y P A I D I N T O C O U R T.

See PAYMENT OF MONEY INTO COURT.

### M O R T G A G E.

See BILL OF LADING, SHIP, No. 2.  
TITLE DEEDS.

### M U T I N Y.

See SOLDIERS, No. 2, 3.

### N.

### N E W A S S I G N M E N T.

See PLEADING, No. 7.

### N E W T R I A L.

See TRIAL, *New.*

### N O N P R O S, Judgment of.

See PRACTICE, No. 17, 18.

### N O N - R E S I D E N C E.

See Q U O W A R R A N T O I N F O R M A T I O N, No. 6, 7, 8. R E C T O R.

### N O N S U I T, Judgment of.

See PRACTICE, No. 45.

1. A plaintiff cannot be nonsuited without his consent after he has appeared. *Watkins v. Towers.* 275

2. It seems that undertaking by a rule of Court to give material evidence in the county of *A.* in order to fix the *venue* there, does not imply a consent to be nonsuited if the party fail. 281.

### N O R W I C H.

See SHERIFF, No. 12, 13.

### N O T I C E.

See EJECTMENT, No. 1. TROVER, No. 3.

### O.

### O F F E N C E.

See INDICTMENT.

### O F F I C E R.

See JUSTICE OF THE PEACE. VISITOR, No. 8, 9. Q U O W A R R A N T O I N F O R M A T I O N. 1. A



## INDEX TO THE PRINCIPAL MATTERS.

1. A jurat of the corporation of *Hastings* may be elected town clerk of that corporation. *Milward v. Thatcher.* Page 81
2. But the two offices are incompatible; and the acceptance of the latter, though an inferior office, will vacate the former. *ib.*
3. Where a corporation consists of a mayor, 12 jurats, freemen, and a townclerk, which latter was elected by the others, and the jurats sit as judges in a court of record, and hold pleas of the crown; and any two of them with the mayor may hold a court, but all the jurats have a right to attend as judges without being summoned; although there were many instances within the borough of *Hastings* of a jurat having held the office of town clerk, yet the Court held the offices to be incompatible. *ib.*
4. Although the names of the clerk of assize; and clerk of arraigns, are inserted in the commissions of oyer and terminer, yet there never was an instance of their acting as judges, nor have they any authority to decide on any question. *ib.*
5. Suspension makes no vacancy in an office; it is only an impediment to the enjoyment of any benefit from it: but all acts, which are required to be done by such officer, must still be done by him to give them validity. *Per Holt in Philips v. Bury.* 351
6. The head of a college hath not such an estate in his office as will entitle him to maintain an assize for it; for he hath no sole seisin. *ib.* 355.

### ORDER OF JUSTICES.

1. The court of *B. R.* will intend every thing in an order of justices to be right, unless the contrary appear. *R. v. The Undertakers of the Aire and Calder Navigation.* 666
2. The court of *B. R.* will not go into any question not intended to be referred to them by a case stated at the court of quarter sessions, on an appeal against an order of justices. *ib.*
3. How far such an order unappealed against is conclusive on the parties. See *Settlement by hiring and service* 8, 9, 10. *Settlement by taking a tenement*, 3.
4. An order of removal only prohibits the party thereby removed from returning

again in a state of vagrancy to the same parish. *R. v. Inhabitants of Fillongley.* Page 711

### OVERSEER.

1. A woman may be appointed an overseer of the poor. *The King v. Alice Stubbs.* 395
2. Where a district contains only three houses, the inhabitants of all three may be appointed overseers of the poor, notwithstanding two of them are labourers and poor. *ib.*
3. An appointment of overseers, dated in October for a year next ensuing the date, is good, because it shall be understood to be the overseer's year. *ib.*
4. The word *substantial* as applied to overseers in the 43 *Eliz. c. 2.* must be understood relatively. *ib.*

### OYER.

1. The party, who is to give oyer of a deed, is allowed two days for that purpose, exclusive of the day on which it is demanded. *Page v. Divine.* 40

### P.

### PARDON.

1. **T**HE power of the Crown to pardon a forfeiture, and to grant restitution, can only be exercised where things remain in *statu quo*; but not so as to affect legal rights vested in third persons. *R. v. Amery.* 569

### PARENT and CHILD.

See *TRESPASS.*

### PARISH.

See *PRESENTMENT.*

1. If the inhabitants of a township, bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish. *The King v. The Inhabitants of Sheffield.* 106
2. The



## INDEX TO THE PRINCIPAL MATTERS.

2. The parish at large is *prima facie* bound to repair all high roads lying within it, unless by prescription they can throw the onus on particular persons by reason of their tenure. Page 106

### PARTNERS.

1. The plaintiffs together with *A. & B.* being owners of one ship, and the defendant of another, a prize was taken, condemned, and shared by agreement between them: afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which was paid solely by the plaintiffs, *A. and B.* having in the mean time become bankrupts: an action cannot be brought by the plaintiffs alone for a moiety of the restitution money and of the costs, because it was either a partnership transaction, when *A. and B.* ought to be joined; or not, when separate actions should be brought by each of the persons paying. *Graham v. Robertson.* 282
2. One partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith v. Barrow.* 476
3. Where money is owing to two partners, and after the death of one it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor. *ib.*
4. And the defendant in such action may set off what is due to him from the plaintiff. *ib.*
5. Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust, and make a final settlement at the end of the partnership, and they dissolve the partnership before the seven years are expired, and account together, and strike a balance which is in favour of the plaintiff, including several items not connected with the partnerships, and the defendant promises to pay it, an action of *assumpsit* lies on such express promise. *Foster v. Allanson.* 479

6. Where the consignee of goods to whom the bill of lading was indorsed in blank assigned it over as a security for acceptances given by the assignee not amounting to the value of the goods, and afterwards by an agreement between them the profits and loss were to be equally divided, but the first was to stand guarantee to the other for the solidity of the factors by whom the goods were to be sold; and it appeared by the agreement that the consignor has not been paid for the goods, the assignee of the bill of lading cannot maintain trover against the consignor, if he stop the goods *in transitu* on the insolvency of the consignee. *Salomons v. Nissen.* Page 674

### PAYMENT OF MONEY INTO COURT.

1. Where a rule to change the *venue* in an action of *assumpsit* from *A.* to *B.* has been discharged on the plaintiff's undertaking to give evidence of some matter in issue arising in *A.*, the undertaking is complied with by proving a rule of Court in it that the defendant shall be at liberty to pay money into Court, though that rule was obtained after the discharge of the rule for changing the venue; for the payment of money into Court is an admission of the cause of action. *Watkins v. Towers.* 275
2. The only case where a party shall be bound by the payment of money, though by mistake, is where it is paid into Court under a rule. *Malcolm v. Fullerton.* 645

### PAWNBROKER.

See PLATE, No. I.

### PENAL ACTION.

See SHERIFF, No. 6, 8, 9, 10. WITNESS, No. 4.

1. Where a statute gives accumulative damages to a party grieved, it is still but a civil remedy. *Woodgate v. Knatchbull.* 154
2. Proceedings in a penal action on 25 *Ed.* 3. *ft.* 4. c. 3. stayed on motion, because no affidavit had been filed that the offence was



## INDEX TO THE PRINCIPAL MATTERS.

- committed within the county where the action was brought, or within a year, according to 21 Jac. 1. c. 4. *White Q. T. v. Boot.* Page 274
3. Where a *Qui Tam* action for usury had been depending four years, the Court would not allow amendments to be made in the declaration, though the pleadings were still in paper. *Goff Q. T. v. Popplewell.* 707

### PENALTY.

See CONVICTION, No. 4, 5. PENAL ACTION. *See Bond. 1.*

### PERMIT.

See EXCISE.

### P L A T E.

1. A pawnbroker has no lien on plate after the death of a tenant for life who pawned it with him, as against the remainder-man, altho' the pawnee had no notice of the settlement. *Hoare v. Parker.* 376

### P L E A D I N G.

See TRESPASS. COMPOSITION. PENAL ACTION, No. 3.

1. An agreement between a debtor and his creditors that they will accept a composition, in satisfaction of their respective debts, to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand. *Heathcote and others v. Crookshanks.* 24
2. In debt for goods sold and delivered the plaintiff declared that the defendant at *Westminster in the county of Middlesex* was indebted to him in a certain sum for goods sold and delivered, without alleging an express contract, and place where such contract was made; upon special demurrer for these causes, the Court held the contract and venue well laid. *Emery v. Fell.* 28
3. A declaration in *scire facias* by the assignees of a bankrupts stating, "that he became "a bankrupt within the meaning of the

"statutes &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain, without alleging that the party was declared a bankrupt, or that his effects were assigned by deed. *Winter v. Kretzman.* Page 45

4. A voluntary return of a prisoner, after an escape, before action brought, is equal to a retaking on a fresh pursuit: but it must be pleaded. *Bonafous v. Walker.* 126
5. Under a count for a voluntary escape the plaintiff may give evidence of a negligent escape: and the defendant may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. *ib.*
6. An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner, who was in execution on a judgment obtained by her as administratrix. *ib.*
7. Where a declaration for false imprisonment against *A.* and *B.* contained two counts, to both of which the defendants pleaded not guilty, and justified the first under mesne process, *A.* as the plaintiff in that action, and *B.* as the bailiff; and the plaintiff, by a new assignment, admitting the arrest to be lawful, replied that *B.* with the consent of *A.* voluntarily released him and that they afterwards imprisoned him, for the time mentioned in the first count; the plaintiff having failed in proving the new assignment, by not shewing the consent of *A.*, shall not be permitted to prove the same trespass against *B.* under the other count. *Atkinson v. Matteson* 172
8. A declaration in an action for a malicious prosecution for felony must state that the prosecution is at an end: and alleging that the plaintiff was discharged from his imprisonment is not sufficient. *Morgan v. Hughes.* 225
9. The word *acquitted* indeed has a legal definite meaning, and must be understood in its legal sense, namely, by a jury on the trial. *ib.* 231

10. So



## INDEX TO THE PRINCIPAL MATTERS.

10. So if it had been alleged that the plaintiff had been discharged by the grand jury's not finding the bill; that would have shewn a legal end to the prosecution. *Page 232*
11. If a deprivation by a visitor be pleaded, there is no occasion to shew the cause. *Per Holt, Ch. J. in Philips v. Bury. 354*
12. After a defendant has obtained an order for time to plead on the terms of pleading issuably, he cannot plead the statute of limitations, or any other plea which does not go to the merits: and if he plead such a plea, the Court will set it aside on motion. *Stadholme v. Hodgson. 390*
13. If defendant plead to debt on bond that plaintiff won money of him at cards, and that the bond was given for securing payment of it; to which the plaintiff replies that it was given to secure the payment of money justly due, and not for securing the payment of money won; the replication may either conclude to the country, or with an averment. *Hedges v. Sandon. 439*
14. The general rule is this; where a replication denies the whole substance of the plea, there the plaintiff may tender issue, and conclude to the country; though indeed there are exceptions to that rule, where the replication is proper either way: But where the plaintiff selects one out of several facts in the plea, he may traverse that one, and conclude with a verification. *ib.*
15. Where money is owing to two partners, and, after the death of one it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor. *Smith v. Barrow. 476*
16. So if money belonging to a testator be received by one after the testator's death, his executor may maintain an action for money had and received in his own right. *ib.*
17. The statute 23 H. 6. c. 9. relating to bail bonds is a public act; therefore the court will take notice of it though it be not pleaded, *Samuel v. Evans. 569*
18. And if it appear in a declaration, by the assignee of a sheriff on such bond, that the bond is void by the provisions of that sta-

- tute, the Court on motion will arrest the judgment after verdict against the defendant upon a plea of *non est factum*. *Page 569*
19. To a plea to *scire facias* against bail that the principal died before the return of any *ca. sa.* a replication stating a particular *ca. sa.* and that the principal was alive at the return of that *ca. sa.* must conclude with an averment: for the *ca. sa.* in the replication is new matter; and, by the rules of pleading, whenever new matter is introduced the other party must have an opportunity of answering it. *Henderson v. Withy. 576*

### P O O R.

*See RATE.*

### P O S T E A,

*See VERDICT.*

### P O U N D A G E,

*See SHERIFF, No. 2, 3, 4.*

### P O W E R.

*See LIMITATION.*

1. Every execution of a power must have a reference to the original instrument creating that power, and whoever claims under the execution must make title under the power itself. *Robinson v. Hardcastle. 241*  
*380, 781*
2. So that where a power was given to A. on his marriage, to appoint to and amongst the children of the marriage, in such proportions, &c. and in default of such appointment, the estate was limited to the first and other sons of the marriage in tail, and A. by will appointed to his eldest son C. for life, remainder to trustees, &c. remainder to the first and other sons of C. in tail, and in default of such issue to D. another child of A., the limitation of a life estate to a person not in being at the original creation of the power being void, the subsequent limitations depending thereon are void also, and C. the eldest son took an estate tail either under the execution of the power or the original settlement. *ib.*

3. If



## INDEX TO THE PRINCIPAL MATTERS:

3. If there be an agreement before marriage, that a settlement shall be made of the wife's estate, reserving to her a power of disposing of it, which agreement is signed by the intended husband and wife, but not sealed, and before the marriage the wife disposes of it to the husband, who survived her, and disposes of the estate by will; the title of his devisee is such a doubtful equity as cannot be set up in an ejectment against the title of the wife's heir at law. *Doe v. Staple.* Page 684
4. A power to raise portions may be executed at several times, provided the first execution be not meant as a complete execution, and that the party in the whole execution do not transgress the limits of the power. *Doe v. Milborne.* 721
5. A power given to an executrix to raise a portion for a younger child does not extend to real estates, of which she was also trustee. *ib.*

### PRACTICE.

See BAIL. BAIL IN ERROR. CERTIORARI. PENAL ACTION, No. 2, 3. VENUE, No. 3, 4. PAYMENT OF MONEY INTO COURT. EXCISE, No. 4. BOND, No. 1, 2. COSTS. RULES OF THE COURT. AMENDMENT.

1. A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within six months after the expiration of his office, notwithstanding he was requested by the party to return it before the six months were expired. *The King v. Jones.* 1
2. If on the return of a writ in a personal action the defendant cast an essoin, which is not adjourned to a particular day, and it is not quashed, and the plaintiff deliver his declaration on the first day of the following term, the defendant is not entitled to an imparlance. *Rooke v. The Earl of Leicester.* 16
3. Where an essoin is not adjourned to a particular day, nor quashed, the declaration cannot be delivered till the first day of the term. *ib.*
4. If the defendant in error from C. B. to B. R. give an eight day rule to certify the re-

- cord, the record may be certified in less time, though the rule expire in vacation: And a *sci. fa. quare executionem non* having been issued immediately upon the record being certified, returnable the first day of the following term, the defendant may serve the plaintiff in error on that day with a rule to appear to the *sci. fa.* and a rule to assign errors. *Sambridge v. Housley.* Page 17
5. The party, who is to giveoyer of a deed, is allowed two days for that purpose exclusive of the day on which it is demanded. *Page v. Divine.* 40
6. No proceedings having been had for above a year, the plaintiff two days before Hilary term gave notice of his intention to proceed, two days after the term he served a rule to plead, and in the same vacation judgment was signed for want of a plea, which was held to be regular; and the judgment appearing to be signed as of Hilary term makes no difference. *Milbourne v. Nixon.* 40
7. The Court will not set aside an execution sued out before, but executed after, the allowance of a writ of error served on the sheriff and the party, if the plaintiff in error has not regularly put in bail. *Lane v. Bacchus.* 44
8. *Secus*, if bail be put in in time. *ib.*
9. In debt on recognizance bail in error in the Exchequer chamber are not liable to pay interest on the judgment, between the signing of the judgment in B. R. and the affirmance of it in Cam. Scacc. *Frith v. Leroux.* 157
10. But they are liable for interest due subsequent to the affirmance. *ib.*
11. The Court will not direct the master to include interest in the costs to be taxed on non-prossing a writ of error, returnable in parliament, for want of transcribing. *Cumming v. Hanforth.* 58
12. See the difference of the form of the recognizance on writs of error in Cam. Scacc. and B. R. 59 n.
13. The Court will not stay proceedings in debt upon a judgment while a writ of error is depending, if the writ of error appear to be merely for the purpose of delay. *Entwistle v. Shepherd.* 78
14. In



## INDEX TO THE PRINCIPAL MATTERS.

14. In debt on a judgment affirmed in error the jury by way of damages may give interest on the sum recovered by the judgment from the time of signing it, where, by the practice of the Court in which error is brought, such interest is not allowed in costs on the affirmance. *Page* 78
15. If the plaintiff do not declare within two terms after the return of the writ, the defendant may sign judgment of *non pros*; but if no such judgment be signed, the plaintiff may declare within a year. *Worley v. Lee.* 112
16. A rule for setting aside an execution, sued out after the allowance of a writ of error, discharged without costs, the writ of error having been taken out against good faith. *Cates v. West.* 183
17. If plaintiff declare against one of two defendants named in his writ, and does not proceed against the other, the latter may sign judgment of *non pros* immediately. *Roe v. Cock.* 257
18. So if plaintiff serve notice of declaration, or take out a rule for time to declare against one only, without proceeding against the other. *ib.*
19. And wherever it can appear that the action is not a joint action, judgment of *non pros* may be signed by all or any of the defendants named in the writ. *Butler v. Up-ton.* *ib.* 259. n.
20. The Court will not at a distance of time after the trial amend the *poslea* by encreasing the damages given by the jury, although all the jurymen join in an affidavit stating their intention to have been to give the plaintiff such encreased sum, and that they conceived that the verdict they had given was calculated to give him such sum. *Jackson v. Williamson.* 281
21. Explanations of that sort should be given at the time of the trial. *ib.*
22. The Court will not discharge a defendant out of custody on filing common bail on the ground that he has become insane since the arrest. *Kernot v. Norman.* 390
23. After a defendant has obtained an order for time to plead on the terms of pleading issuably, he cannot plead the statute of limitations, or any other plea which does not go to the merits; and if he plead such a plea, the Court will set it aside on motion. *Stadholme v. Hodgson.* *Page* 390
24. Where issues are taken on some of the pleas and demurrer to others, the plaintiff has a right to argue the demurrers either before or after trial. *Duberley v. Page* 394
25. After a nonsuit in trespass the Court will stay proceedings in a second action between the same parties for the same cause until the costs of the nonsuit are paid, notwithstanding the plaintiff be a prisoner at the time of bringing the second action, and sue in *forma pauperis*. *Weston v. Withers.* 511
26. The like in the case of an action on the statute of bribery. *Moulton Q. T. v. Bingham.* *ib. n.*
27. The like in the case of an action for a malicious prosecution. *Baldwyn v. Richards.* *ib. n.*
28. The Court will not (before trial) stay proceedings in an action for a penalty against a sheriff's officer on 32 Geo. 2. c. 28. §. 12. though a similar action has been commenced against the sheriff for the same offence. *Pechell v. Layton.* 512
29. But after verdicts in both actions, the Court will stay the proceedings in both, on paying one penalty, and the costs in one action. *Peshall v. Layton.* 712
30. For the sheriff and bailiff are not both answerable in an action for a penalty for the same act. *ib.*
31. The Court refused to set aside the bill of *Middlesex*, which was to answer the plaintiff in a plea of *debt*, instead of *trespass*. *Barber v. Lloyd.* 513
32. The Court refused to grant an attachment against a sheriff for neglecting to take a replevin bond. The party has his action against the sheriff. *The King v. Lewis* 617
33. If two actions be brought by the same plaintiff at the same time for causes which may be joined in one action, and the defendant is holden to bail in both, the Court will compel the plaintiff to consolidate them, and to pay the costs of the application. *Cecil v. Briggess.* 639



## INDEX TO THE PRINCIPAL MATTERS.

34. The only case in which a party is bound by the payment of money, though by mistake, is where it is paid into Court under a rule. *Malcolm v. Fullarton.* Page 645
35. In trover for goods, where the defence is that they were sold by the plaintiff, the Court will give the defendant time to plead, in order that he may obtain a discovery from the Court of Chancery in the mean time. *Whitter v. Cazelet.* 683
36. The plaintiff cannot file common bail according to the statute after the succeeding term after the writ is returnable. *Smith v. Painter.* 719
37. The plaintiff may deliver a declaration against the defendant conditionally before the time for his appearing is past, and file common bail for him: but after that time he must bring the defendant into Court before he can declare. *ib.*
38. The plaintiff is not bound by the practice of this Court to give notice of trial till the term after that in which issue is joined. *Hall v. Buchanan.* 734
39. If the plaintiff recover a judgment against two defendants in *B. R.* and one of them bring a writ of error in *Cam. Scacc.*, the plaintiff cannot charge the other defendant in execution till the record be remitted into the Court of *B. R.* notwithstanding the writ of error might have been quashed immediately because not brought by both defendants. *Laroche v. Wasborough and Mailand.* 737
40. In such case where the judgment was affirmed in *Cam. Scacc.* and costs given of the writ of error, and both defendants were taken under a writ of execution on the whole sum, including the costs of the writ of error as well as the original sum recovered, this Court permitted the plaintiff to amend his writ of execution, as to the defendant who did not join in the writ of error, by altering it to the original sum recovered. *ib.*
41. The Court set aside proceedings in *scire facias* against bail, because they were summoned only an hour before the Court rose on the return day. *Webb v. Harvey.* 757
42. The sheriff's return of *scire feci* does not estop the bail from shewing that they were

- summoned so late on the return day, that they could not bring in their principal before the rising of the Court. *Ib. & Pool v. Wills.* Page 758. n. a.
43. Where a defendant justified, in trespass, under a custom which was bad in law, and the issue on it was found for him, the Court set aside the verdict on that issue, and entered a verdict for the plaintiff with nominal damages. *Selby v. Robinson.* 758
44. Where the plaintiff in ejectment is nonsuited at the trial for want of the defendant's confessing lease entry and ouster, he is not entitled to sign judgment against the casual ejector till the *postea* comes in on the day in bank. *Doe v. Copeland.* 779
45. A motion that an award should be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made before the last day of the next term after such award made, according to 9 & 10 *W. 3. c. 15. s. 2.*, although the arbitrator be not charged with corruption or undue means. *Zachary v. Shepherd.* 781

### PREBENDARY.

See DILAPIDATIONS, No. 1, 2.

### PRESCRIPTION.

See PARISH.

### PRESENTMENT.

1. A presentment under 13 *Geo. 3. c. 78. s. 24.* against a smaller district than a parish must state expressly *how* they are liable. *R. v. The Inhabitants of the Hamlet of Penderryn.* 513.
2. If it do not, the judgment may be arrested. *ib.*

### PROHIBITION.

1. These words spoken of a woman, "I have kept her common these seven years; she hath given me the bad disorder, and three or four other gentlemen besides," are not actionable, because they may refer to a time



## INDEX TO THE PRINCIPAL MATTERS.

- a time *past*: and no prohibition will be granted to a spiritual court *after sentence* upon a libel for this charge. *Carlake v. Mapledoram.* Page 473
2. Calling a person *where* is libellous in the spiritual court. *ib.*
  3. If the spiritual court hath cognizance of part of the charge only, and not the rest, the Court, after sentence below, would not grant a prohibition. 473

### P R O M I S E.

See FRAUDS, Statute of.

### P R O M O T I O N S. 642, 643.

## Q.

### Q U I T A M.

See PENAL ACTIONS.

### Q U O W A R R A N T O I N F O R M A T I O N.

1. A new trial may be granted in an information in nature of *quo warranto*. *R. v. Francis.* 484
2. Informations in nature of *quo warranto* have been considered of late years merely as civil proceedings. *ib.*
3. Possession of a corporate franchise for less than 20 years is not of itself a sufficient objection to an information in nature of a *quo warranto* to try the validity of the title to such franchise. *R. v. Bond.* 767
4. But the circumstance of the relator's standing in the same situation with the defendant, or its appearing that the corporation must necessarily be dissolved by impeaching the defendant's title, and the title of those who claim under him, will govern the discretion of the Court in refusing such an application. *ib.*
5. The fact of the defendant's title having been before attacked by a similar information, which was afterwards abandoned, has no weight. *ib.*
6. A corporate office does not become *ipso*

- facto* vacant by the non-residence of the corporator. *R. v. J. Heaven.* Page 772
7. It may be a cause of forfeiture; but the corporator does not lose his franchise, till a sentence of amotion by the corporation has been pronounced. *ib.*
  8. And the Court of *B. R.* will not grant an information in nature of a *quo warranto* against him, until he has been amoved by the corporation. *ib.*
  9. The offices of town clerk and alderman are not necessarily incompatible. *R. v. W. Pateman.* 777
  10. But where the town clerk's accounts are allowed by the aldermen, or where a town clerk acts ministerially under the aldermen, who are judicial officers, the offices are incompatible; and the appointment to the former office is equivalent to an amotion by the corporation from the latter office. *ib.*
  11. And if the person so appointed continue to exercise the office of alderman, a *quo warranto* information will be granted against him. *ib.*

## R.

### R A T E.

1. **I**F *A.* has an exclusive right of using a way-leave over land which he holds in common with *B.* paying *B.* a certain sum yearly, and has the privilege of using a way-leave occupied by *C.* paying him so much *per ton* for the goods carried over it, *A.* is not liable to be rated to the relief of the poor in respect of either of such way-leaves. *R. v. Jolliffe.* 90
2. *Quare*, Whether the owner of the land, who receives a profit for such way-leave, is not liable to be rated for such an encrease of value? *ib.*
3. A *certiorari* will not be granted to remove a poor rate, because of the public inconvenience which would attend it. *The King v. King and Others.* 235
4. Stables rented by the colonel of a regiment by order of the crown for the use of the



## INDEX TO THE PRINCIPAL MATTERS.

- the regiment are not liable to be rated to the relief of the poor. *Lord Amberst v. Lord Somers.* Page 372
5. The possessions of the crown, or of the public, are not rateable. *ib.*
6. Where a person is *overcharged* in a poor rate, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him, under the 17 G. 2. c. 38. *R. v. The Inhabitants of Cheshunt.* 623
7. Where a navigation runs from A. to B. through several intervening parishes, and the tolls for the whole navigation are collected in these two parishes, they may be assessed to the poor-rates in these two parishes for the whole amount according to the proportion collected in each. *R. v. The Undertakers of the Aire and Calder Navigation.* 660
8. The justices below are the proper judges of the equality of poor-rates; and the Court of B. R. will not interfere on the ground of their being unequal, unless the inequality be manifestly apparent on the rate. *ib.*
9. A person shall be rated for profits where they become due, not where they happen to be received. *ib.*
10. Where a statute says that a company shall not be liable to any rates which had not *usually* been assessed; that only means that they shall not have any other *kind* of rate imposed on them than those which were then levied, but does not fix the proportion of the rate. *ib.*
11. It is not necessary to state in a reserved case, that the rate was regularly published in the church, if that question was not intended to be referred. *ib.*

### RE-ASSURANCE.

See INSURANCE, No. 3.

### REASONABLE TIME.

See LANDLORD AND TENANT, No. 6, 7, 8.

### RECEIPT.

1. A receipt is not conclusive evidence against the party signing it; but he may shew that he did not receive the sum or thing in question. *Stratton v. Rasfall.* Page 366

### RECEIVING STOLEN GOODS.

1. Persons receiving any goods &c. belonging to a vessel in the *Thames*, knowing the same to be stolen, may be prosecuted for a felony under the 2 Geo. 3. c. 28. *Rex v. Wyer.* 77

### RECOGNIZANCE.

See BAIL IN ERROR. COSTS, No. 7, 8, 9.

### RECTOR.

1. A lease of a rectory by a rector becomes void by the 13 Eliz. c. 20. by his non-residence for 80 days, of which a stranger may take advantage. *Doe v. Barber.* 749
2. There is no distinction between a demise by deed or by parol. *ib.*
3. And his lessee cannot maintain an ejectment against a stranger, who enters without any title whatever. *ib.*

### RELATION.

1. When a trader becomes a bankrupt by lying in prison two months, the act of bankruptcy relates back to the arrest, so as to vest his property in the assignees from that time. *King v. Leith.* 141
2. Therefore the assignees may maintain an action for money had and received against a person, who, having notice that a commission would be issued against him, sold his goods and paid him the produce before the expiration of the two months. *ib.*

### REMOVAL, Order of.

See SETTLEMENT, by HIRING and SERVICE, 8, 9, 10, 11.

### RENT.

See LANDLORD AND TENANT, No. 5.

### REPAIRS



## INDEX TO THE PRINCIPAL MATTERS.

### REPAIRS.

See DILAPIDATIONS. INSURANCE, No. 11.

### REPLEVIN.

See COSTS, No. 10.

### REPLEVIN BOND.

See SHERIFF, No. 11.

### REPLICATION.

See PLEADING.

### RESTITUTION.

See TROVER, No. 3, 4, 5, 6.

1. The power of the Crown to pardon a forfeiture, and to grant restitution, can only be exercised where things remain in *statu quo*, but not so as to affect legal rights vested in third persons. *R. v. Amery.* Page 569

### RETURN.

See MANDAMUS, No. 8, 9, 10.

1. A return made by a sheriff that the person arrested was rescued out of the custody of the bailiff is bad: it should be out of *his* custody. *Woodgate v. Knatchbull.* 155

### REVENUE.

See EXCISE.

### REVENUE, Books of.

See EVIDENCE, No. 9.

### ROADS.

See HIGHWAYS.

### RULES OF THE PRISON.

1. An escape from the rules of the *King's Bench* prison, without the marshal's knowledge, is not a voluntary escape. 126

### RULES OF THE COURT.

1. Where a defendant is brought up for sentence on any indictment, or information, *after verdict*, the defendant's affidavits shall be first read, and then those for the prosecution; after which the defendant's counsel shall be heard, and lastly, the counsel for the prosecution. Page 683
2. Where a defendant is brought up for sentence *after judgment by default*, the prosecutor's affidavits shall be first read, then the defendant's; after which the counsel for the prosecution shall be heard, and lastly the defendant's counsel. *ib.*
3. But if no affidavits be produced, the defendant's counsel shall be heard first, and then the counsel for the prosecution. *ib.*

### S.

### S A L E.

See WARRANTY.

### SCIRE FACIAS.

See PLEADING, No. 3, 19. PRACTICE, No. 41, 42.

1. *A Scire facias* is an action. *Winter v. Kretchman.* 46

### SECURITY.

See BILL OF LADING.

### SEIZURE.

See EXCISE.

### SERJEANTS AT LAW. 642

### SESSIONS.

See WITNESS, No. 1, 2, 3. EXCISE, No. 5. CERTIORARI, No. 11, 12.

1. The Court will not send a case down to the sessions to be retried on a mere formal objection, 10 A



## INDEX TO THE PRINCIPAL MATTERS.

objection, if enough appear to enable them to decide according to the merits of the case. *R. v. The Inhabitants of Middlezoy.* Page 41

2. When the sessions adjudge a place to be a vill by reputation, as a substantive fact, this Court is precluded from going into the question, notwithstanding the sessions state all the evidence particularly on which they formed their opinion. *The King v. The Inhabitants of Ronton Abbey.* 207

3. Where a person is overcharged in a poor rate, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him, under the 17 Geo. 2. c. 38. *R. v. The Inhabitants of Cheshunt.* 623

### SET-OFF.

1. If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished at the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed. *Fletcher v. Dyche.* 32

2. Where a partner or executor brings an action in his own right for money received after the death of the other partner or testator, the defendant may set off whatever was due to him from the plaintiff. *Smith v. Barrow.* 476

### SETTLEMENT, Marriage.

See EJECTMENT, No. 2. LIMITATION.

### SETTLEMENT OF THE POOR.

See WITNESS, No. 1, 2, 3.

### BY APPRENTICESHIP.

1. If a poor boy be bound apprentice by the parish officers, with the consent of two justices of the county, to a master residing in a different parish and county, and all

the parties (except the apprentice) sign the indenture, the apprentice will gain a settlement in the parish of the master by residing there 40 days under the indenture. *R. v. The Inhabitants of St. Nicholas, Nottingham.* Page 726

### BY CERTIFICATE.

1. An allowance of a certificate of a settlement, as having been duly executed, written in the margin of the certificate, and signed by two justices, is alone sufficient proof of the certificate, where such certificate is above 30 years old, notwithstanding the allowance does not certify the affidavit of one of the witnesses as to the due execution and attestation of the certificate according to the 3 Geo. 2. c. 29. *The King v. The Inhabitants of Farringdon.* 466

2. *Qu.* Whether an allowance of a certificate written in the margin, and signed by two justices, which allowance does not certify any affidavit made by one of the witnesses according to 3 Geo. 2. c. 29., can be connected with a writing on the other side of the same paper, not signed by the justices, certifying that such an affidavit was made, so as to amount to proof of such certificate within the provisions of 3 Geo. 2. c. 29. *ib.*

### BY ESTATE.

1. Where a woman, on her marriage with a copyholder of a manor, in which the widows of husbands dying seised are entitled to their free-bench, gave a bond that the son of her intended husband by a former wife should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and after the death of the husband the widow delivered up the possession to the son according to the bond, he gained a settlement by residing on it forty days. *R. v. The Inhabitants of Lopen.* 577

### BY HIRING AND SERVICE.

1. An agreement by a daughter to live with her



## INDEX TO THE PRINCIPAL MATTERS.

- her father, and to do the offices of a servant for a year for her board and lodging and other perquisites, is a good hiring for a year, though the daughter is to be at liberty to earn what she can by her labour; and a service under it will be sufficient to gain a settlement. *R. v. The Inhabitants of Chertsey.* Page 37
2. If a master and servant before Michaelmas agree for yearly wages, and the master while he is taking money from his pocket to give earnest tells him that *he shall be absent a fortnight at Michaelmas because of his settlement*, and that he will give him that time to get what he can, to which the servant assents, this is a mere dispensation of the service for that time, and not such an exception out of the original contract as will make the hiring insufficient for the purpose of gaining a settlement. *The King v. The Inhabitants of Sulgrave.* 376
3. The servant's apprehending that his master would not have hired him, if he had not agreed to the fortnight's absence, will not alter the case. *ib.* § 455
4. A *bonâ fide* exception of part of the time at the time of hiring will prevent a settlement, but if there be no exception then a permissive absence afterwards will not prevent it. *ib.*
5. An hiring at so much *per week* is not an implied hiring for a year. *R. v. The Inhabitants of Newton Toney.* 453  
And *R. v. Odibam.* 622
6. If there be any thing in the contract to shew that the hiring was intended to be for a year, there a reservation of weekly wages will not control that hiring. 453
7. But if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring. *ib.*
8. After an order of removal unappealed from, a new settlement can only be gained by some act altogether subsequent to the removal. *R. v. The Inhabitants of Kenilworth.* 598
9. Therefore if a pauper in service at *A.* under a yearly hiring be removed to *B.* and does not appeal, but returns in a few days to his master at *A.*, is received by him,

serves out the year, and receives his full wages, yet he gains no settlement in *A.*

Page 598

10. The order of removal in that case put an end to the service. *ib.*

See Settlement by taking a Tenement, No. 3, 4.

11. If a servant, hired for a year, give warning 8 days before the expiration of the year to leave his master at the end of the year, and the master discharge him on the same day, paying him his full wages, the servant being willing to stay till the end of the year, the contract is not hereby dissolved so as to prevent the servant's gaining a settlement; but the discharge is merely a dispensation with the remainder of the service. *R. v. The Inhabitants of St. Philip in Birmingham.* 624

12. If the master fraudulently turn away the servant with a view of preventing his gaining a settlement, or wrongfully discharge him before the end of year, that will not defeat the servant's settlement. 626

13. If a yearly servant be discharged 4 or 5 days before the end of the year on his master's becoming a bankrupt, and receive the full year's wages, the service is sufficient to give him a settlement. *R. v. The Inhabitants of St. Andrew, Holborn.* 627

### BY PURCHASE.

See WITNESS, No. 1, 2, 3.

1. Where *A.* contracted for the purchase of a copyhold estate for 39 *l.* mortgaged to another person for 32 *l.* and paid 7 *l.* and was admitted to the estate, subject to the mortgage, he did not gain a settlement by it under the 9 Geo. 1. c. 7. *R. v. The Inhabitants of Mattingley.* 12

### BY RATES.

1. Where the farm was rated, and the landlord paid the rate, and was allowed it by the tenant, the tenant did not gain a settlement, it being stated that the overseer did not know that the tenant resided there. *R. v. The Inhabitants of Llangammarch.* 628



## INDEX TO THE PRINCIPAL MATTERS.

2. For though, where a *house* is rated, it is *prima facie* a rate on the occupier, it is not conclusive. Page 628

### BY TAKING A TENEMENT.

See SETTLEMENT BY HIRING AND SERVICE, No. 8, 9, 10.

1. In order to gain a settlement by taking a tenement of 10 *l. per annum*, the occupier must reside in the parish where part of the premises lies. *R. v. The Inhabitants of Knighton.* 48
2. Taking the hay grafs and aftermath of a meadow for ten months at the annual value of 10 *l.* is a taking of a tenement within 13 & 14 *Car. 2. c. 12.* so as to give the party taking it a settlement. *R. v. The Inhabitants of Stoke.* 451
3. Where a person renting and residing on a tenement of 10 *l.* a year in *A.* was removed to *B.* by an order of two justices, and afterwards returned to the same tenement without making any new contract, and resided there more than 40 days, he thereby gained a settlement, though the order of removal was unappealed from; for the contract was not thereby dissolved. *R. v. The Inhabitants of Fillongley.* 709
4. An order of removal only prohibits the party removed from returning again to the same parish in a state of vagrancy. *ib.*

### SEWERS.

1. The commissioners of sewers have jurisdiction over a sewer, communicating with a navigable stream, or with the sea above the point where the tide ebbs and flows, if it be useful for navigation, and if the place over which the jurisdiction is exercised is, or is likely to be, benefited by it. *Dore v. Gray.* 358

### SHERIFF.

See BAILIFF, No. 1, 2. ESCAPE. PLEADING, No. 4, 5. EXECUTION, No. 3. RETURN, No. 1. BAIL BOND. ANSWERS, No. 3.

1. A sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within six months after the expiration of his office, notwithstanding he was requested by the party to return it before the six months were expired. *The King v. Jones.* Page 1
2. In debt against a sheriff or gaoler for an escape the jury cannot give a less sum than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution. *Bonafous v. Walker.* 126
3. If it appear by the sheriff's return of a writ of execution that greater fees have been taken for the levy than are allowed by 29 *Eliz. c. 4.*, the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. *Woodgate v. Knatchbull.* 148
4. Under that statute the sheriff cannot take any other charge but that for the poundage. *ib.*
5. For all civil purposes the act of the bailiff is the act of the sheriff. *ib.*
6. It seems that an action may be maintained against the sheriff for the penalty given by 29 *Eliz. c. 4.* for the acts of his bailiff. *ib.* 155. 8.
7. An action, brought on 29 *Eliz. c. 4.* for fees, must be brought by the sheriff, and not by the bailiff. *ib.*
8. The Court will not (before trial) stay proceedings in an action against a sheriff's officer for a penalty on 32 *Geo. 2. c. 28. s. 12.* though a similar action has been commenced against the sheriff for the same offence. *Pechell v. Layton.* 512
9. But after verdicts in both actions, the Court will stay the proceedings in both on paying one penalty, and the costs in one action. 712
10. For the sheriff and bailiff are not both answerable in an action for a penalty for the same act. *ib.*
11. The Court refused to grant an attachment against the sheriff for neglecting to take a replevin bond. *R. v. Lewis.* 617
12. The payment of the fine fixed by 9 *Geo. 1. c. 9. s. 3.* to be discharged from serving the



## INDEX TO THE PRINCIPAL MATTERS.

the office of sheriff of *Norwich*, does not exempt the person paying it for more than a year, unless the corporation agree that he shall be discharged for a longer time. *R. v. J. Woodrow.* Page 731

13. The Court granted an information against the person refusing to take on him the office of sheriff, because the vacancy of the office occasioned a stop of public justice, and the year would be nearly expired before an indictment could be brought to trial. *ib.*

### S H I P.

1. A delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself. *Atkinson v. Maling.* 462
2. Where a ship was mortgaged at sea, with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand, but the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival; he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees. *ib.*
3. If *A.* lend money on the security of a ship, and take possession before execution executed at the suit of *B.*, the vessel cannot be seized under *B.*'s execution. *Ladbroke v. Crickett.* 649
4. If the owner of a ship charge her for repairs done in *England* by an instrument under seal, stated to be by way of bottomry, upon which she is afterwards seized by admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence, but between the seizure and decree a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under this writ, or maintain trover against the officer in possession by the warrant of the admiralty. *ib.*

### SLANDER.

1. These words spoken of a woman, "I have

"kept her common these seven years; she hath given me the bad disorder, and three or four other gentlemen," are not actionable, because they may refer to a time past: and no prohibition will be granted to a spiritual Court, in which a sentence has been pronounced on a libel for this charge. *Carlake v. Mappledoram.* P. 473

2. Charging a person with *having had* a contagious disorder is not actionable, because it is no reason why the company of a person so charged should be avoided at that time, it referring to a time past. *ib.*

### S O L D I E R S.

1. Whether ale-house keepers, who have no stables, are bound to receive *horses* as well as soldiers *Quare?* *R. v. Dimpsey.* 96
2. If a soldier be committed to prison for disobeying an order of bastardy till he find sureties for performing it, he is not entitled to be discharged under the mutiny act. *The King v. Archer.* 270
3. The 63d. clause in the mutiny act which exempts soldiers from arrests in certain cases is confined to civil suits. *Ib.* 274

### SPIRITUAL COURT.

See PROHIBITION.

### S T A M P S.

See FORGERY.

### S T A T U T E.

1. The bare recital in a subsequent statute is not sufficient to repeal the positive provisions of a former one. *Dore v. Gray.* 365
2. Evidence of a custom in *Guernsey*, that acts of parliament do not bind the people till registered, cannot be received. *The Attorney General v. Le Meschant.* 201 n.

### TABLE OF STATUTES CITED AND OBSERVED UPON.

#### HENRY III.

20. (*St. of Merton*). c. 4. approving. 391

10 B

EDWARD



# INDEX TO THE PRINCIPAL MATTERS.

## EDWARD III.

25. *β.* 4. *c.* 3. Page 274

## HENRY VI.

6. *c.* 5. Sewers. 358  
23. *c.* 9. Sheriff's bonds. 569

## HENRY VII.

3. *c.* 10. Writs of error. 78

## HENRY VIII.

23. *c.* 5. Sewers. 358  
27. *c.* 24. *f.* 9. Bailiffs of liberties 12

## ELIZABETH.

13. *c.* 5. Fraudulent conveyances. 462  
13. *c.* 20. Rector's lease. 749  
29. *c.* 4. Sheriff's fees. 148  
43. *c.* 2. Overseers. 402, 727

## JAMES I.

3. *c.* 14. Sewers 358  
21. *c.* 4. Penal actions. 274  
21. *c.* 19. *f.* 11. Bankrupt. 465

## CHARLES II.

12. *c.* 24. Excise. 504  
29. *c.* 3. Frauds. 80

## WILLIAM AND MARY.

4 & 5. *c.* 18. *f.* 2. Cofts. 145, 190  
5. *c.* 11. *f.* 3. Cofts. 47  
8 & 9. *c.* 30. Certificate. 466  
— *f.* 5. Apprentice. 730  
9 & 10. *c.* 15. Award. 781

## ANNE.

4. *c.* 16. Cofts. 394  
5. *c.* 14. *f.* 4. Game. 18  
12. *β.* 2. *c.* 23. *f.* 6. Incurrible rogues. 735

## GEORGE I.

9. *c.* 7. Settlement. 12  
9. *c.* 9. Sheriff of *Norwich*. 731  
9. *c.* 22. Setting fire to corn 255  
11. *c.* 4. Mandamus. 732  
13. *c.* 23. Woollen manufacture. 735

## GEORGE II.

3. *c.* 29. Certificate. Page 466  
13. *c.* 24. End-gatherers. 736  
17. *c.* 5. Vagrants. 190, 736  
17. *c.* 38. Amending rate. 623  
19. *c.* 32. Bankrupt's payments. 648  
20. *c.* 37. Sheriff. 1  
29. *c.* 37. *f.* 4. Re-assurance. 161  
30. *c.* 24. *f.* 1. False pretences. 472  
32. *c.* 28. *f.* 12. Sheriff. 512, 712

## GEORGE III.

2. *c.* 28. Receivers of stolen goods. 77  
13. *c.* 78. *f.* 24. Roads. 260  
16. *c.* 30. Stealing deer. 89  
17. *c.* 26. Annuity. 366, 603.  
22. *c.* 47. Lottery. 617  
25. *c.* 72. *f.* 9. Excise. 504  
26. *c.* 10. Mutiny. 96, 270  
26. *c.* 59. Excise. 381

## STOLEN GOODS.

See TROVER, 3, 4, 5, 6.

## SUPERSEDEAS.

See WARRANT, No. 1.

## SURETY.

1. Where a person will not rely on the promise which the law will raise, but takes a bond as a security, he cannot resort to an action of *assumpsit*. *Toussaint v. Martinant*. 100
2. Therefore if a surety bound with his principal for payment of money by instalments take a bond from the principal conditioned for payment of the amount of the instalments before the first of them will be due, and before that time the principal becomes bankrupt and obtains his certificate, and afterwards the instalment bond is discharged by the surety, he cannot maintain an action against the principal for money paid to his use. *ib.*
3. Where an annuity bond, granted by two, becomes void by the neglect of the grantee in not registering a memorial under 17 G.



## INDEX TO THE PRINCIPAL MATTERS.

3. c. 26. he cannot recover back any part of the consideration money from the one who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it. *Straton v. Rastall.* Page 366
4. A contract cannot be carried beyond the strict letter of it as against a surety. *ib.*
5. If *A.* be bound with *B.* as a surety for the payment of a sum certain, and take an absolute bond from *B.* payable the day before the original bond will become due, and *B.* become a bankrupt before the day of payment; *A.* may prove this debt under the commission, and *B.*'s certificate will be a bar to an action by *A.* on the counter-bond, though *A.* does not pay the original bond till after *B.* has committed an act of bankruptcy. *Martin v. Court.* 640

### SUSPENSION.

See OFFICE, No. 5. VISITOR.

### T.

#### TENANT.

See LANDLORD and TENANT.

#### TENDER.

1. Where defendant came into possession of goods wrongfully, no tender is necessary of freight &c. paid by him in order to enable plaintiff to maintain his action. *Lempriere v. Pasley.* 485

#### TERM FOR YEARS.

See TRUST, No. 3.

#### TIMBER.

See COPYHOLDER, No. 8, 9.

#### TITLE DEEDS.

See DEEDS.

### TOLLS.

See RATE, No. 7. TURNPIKE, No. 1, 2.

### TOWN-CLERK.

See OFFICE, No. 1, 2. QUO WARRANTO INFORMATION, No. 9, 10, 11.

### TREES.

See COPYHOLDER, No. 8, 9.

### TRESPASS.

See FALSE IMPRISONMENT. CUSTOM. VERDICT.

1. *Quere*, Whether in an action of trespass for assaulting and beating the plaintiff's niece, *per quod servitium amisit*, the jury can take into their consideration the injury sustained by the niece herself in having been deflowered? *Edmonson v. Machell.* Page 4
2. A father may maintain trespass for breaking, &c. his house, and debauching his daughter, *per quod servitium amisit*, though the daughter be above 21 years of age, where acts of service are proved, though there be no contract for service. *Bennett v. Allcott.* 166
3. Where this kind of offence is accompanied with an illegal entry of the father's house, he has his election either to bring trespass for the breaking, &c. and lay the debauching of the daughter and loss of her service as consequential; or he may bring the action on the case merely for debauching the daughter, *per quod servitium amisit.* *ib.*
4. Licence to enter the plaintiff's house, if pleaded, is a bar to the former action: but it cannot be given in evidence under the general issue. *ib.*
5. In these actions the Court will not readily grant a new trial on account of excessive damages. *ib.*
6. Where a justice of the peace maliciously grants a warrant against another without any information laid before him, upon a supposed charge of felony, the remedy against the justice is trespass and not case. *Morgan v. Hughes.* 225

### TRIAL.



## INDEX TO THE PRINCIPAL MATTERS.

### TRIAL, NEW.

1. Where a new trial is moved for on the ground of a misdirection in point of law, if the Court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law. *Edmonson v. Macbell.* Page 4
2. Value and importance are not of themselves sufficient grounds for granting a new trial, unless there be also some doubt in the question; though they frequently weigh in obtaining a rule to shew cause why there should not be a new trial. *Vernon v. Hankey.* 113
3. The Court will not grant a new trial to let the party into a defence of which he was apprised at the first trial. *ib.*
4. A new trial may be granted in an information in nature of a QUO WARRANTO. *The King v. Francis.* 484

### TRIAL AT BAR.

See COSTS.

### TROVER.

See DEEDS. SHIP, No. 4.

1. Where a ship was mortgaged at sea, with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand, but the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival, he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees. *Atkinson v. Maling.* 462
2. Where defendant came into possession of goods wrongfully, no tender is necessary for the amount of freight, &c. paid by him, to enable the plaintiff to maintain his action of trover. *Lempriere v. Pasley.* 485
3. The owner of goods stolen, prosecuting the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market-overt,

and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession. *Horwood v. Smith.* Page 750

4. For, in order to maintain trover, the plaintiff must prove that the goods were his property, and that *while they were so* they came into the defendant's possession, who converted them to his use. *Ib.* 756
5. But he has a right to restitution of the goods in specie. *Ib.* 755
6. And perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them. *Ib.*

### TRUST. TRUSTEES.

See HIGHWAYS. LIMITATION.

1. The trustees of a public turnpike act, which empowers them to erect toll houses, and mortgage the tolls, and which declares that there shall be no priority among the creditors, have no power to mortgage the toll houses or gates; and if in fact they have made such a mortgage, and an ejectment is brought against them by the mortgagee, inasmuch as they are trustees for the public by a public act of parliament of which the Court will take notice, they are not estopped by their deed from insisting that the act gives them no such power. *Fairtitle dem. Mytton v. Gilbert.* 169
2. A devise to trustees in trust to receive rents and profits during the life of A., and that such profits shall be applied for the subsistence and maintenance of the said A. during his life, is not an use executed in A., and cannot unite with a subsequent legal limitation to the heirs of the body of A. *Silvester v. Wilson.* 444
3. In ejectment the plaintiff must recover on a legal title. A satisfied term may be presumed to be surrendered; but an unsatisfied term, raised for the purpose of securing an annuity during the life of the annuitant, cannot; and may be set up as a bar to the heir at law, even though he claim only subject to the charge. *Doe v. Staple.* 684

### TURNPIKE.



## INDEX TO THE PRINCIPAL MATTERS.

### TURNPIKE.

See HIGHWAYS.

1. The trustees of a public turnpike act, which empowers them to erect toll-houses and mortgage the tolls, and which declares that there shall be no priority among the creditors, have no power to mortgage the toll-houses or gates. *Fairtitle dem. Mytton v. Gilbert.* Page 169
2. If in fact they have made such a mortgage, and an ejectment is brought against them by the mortgagee, they are not estopped by their deed from insisting that the act gives them no such power. *ib.*

### V.

### VAGRANT ACT.

1. A commitment by a justice of peace for a time certain, as for 14 days, under the vagrant act 17 Geo. 2. c. 5. is a commitment in execution, and the party is not entitled to be bailed. *The King v. R. Brooke.* 190

### VENDOR AND VENDEE.

See CONSIGNMENT.

### VENIRE DE NOVO.

1. If there be a bill of exceptions to the rejection of evidence in the court of Great Sessions in Wales, and upon error in B. R. the evidence is deemed admissible, the court of B. R. will award a *venire de novo* into the next English county. *Davies v. Pierce.* 125

### V E N U E.

See PLEADING, No. 2.

1. A., by deed executed in London, for securing the repayment of money lent to B, is appointed receiver of B.'s rents in Middlesex, with a pretended salary which enables him to retain usurious interest; he accordingly receives the rents in Middlesex, but settles the account in London, and there pays the balance on which the usurious interest is allowed; the offence is completed in London, and the venue in a *qui*

*tam* action for the penalty is properly laid there. *Scott Q. T. v. Bress.* Page 238

2. It seems it might be laid in either, for where there are two facts which are necessary to constitute one offence, and they take place in two different counties, the plaintiff may *ex necessitate* lay the venue in either. *ib.* 241
3. Where a rule to change the venue in an action of *assumpsit* from A. to B. has been discharged on the plaintiff's undertaking to give evidence of some matter in issue arising in A., the undertaking is complied with by proving a rule of Court in A. that the defendant shall be at liberty to pay money into Court, though that rule was obtained after the discharge of the rule for changing the venue, for the payment of money into Court is an admission of the cause of action. *Watkins v. Towers.* 275
4. Proving a deed enrolled of record in A. is a sufficient compliance with the rule. *ib.*

### VERDICT.

1. The Court will not at a distance of time after the trial amend the *postea*, by encreasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such encreased damages, and that they conceived that the verdict they had given was calculated to give him such sum. *Jackson v. Williamson.* 281
2. The proper time for explanations of that sort is at the trial. *ib.*
3. Where the defendant justified, in trespass, under a custom which was bad in law, and the issue on it was found for him, the Court set aside the verdict on that issue, and entered a verdict for the plaintiff with nominal damages. *Seiby v. Robinson.* 758
4. Where a special verdict concludes generally, the whole case must appear on the record. *R. v. Calder Navigation.* 666

### VISITOR.

1. Mr. Longmire who had been a fellow of Peterhouse, Cambridge, and had vacated his fellowship by taking a college living, but



## INDEX TO THE PRINCIPAL MATTERS.

had continued his name on the college boards, is not entitled to any preference in the election of a master, as being a member of the *domus* or *foundation*, under these words; "In cujus vero electione hoc imprimis observari volumus, ut ipsius domus atque sociorum ejusdem semper ratio habeatur, ut hi, si qui inter eos ad hoc munus obeundum inveniuntur idonei, cæteris præferantur; sin hujusmodi in domo nulli extiterint, tum aliundè assumantur." *The King v. The Bishop of Ely.* Page 290

2. The fellows having returned two persons to the Bishop of *Ely* as general visitor, for him to choose one, according to the directions of the statutes, to which return the bishop is directed to give *plenam fidem*, and to appoint one of them quem magis utilem intellexerit, et præficiat domui et scholaribus, absque morâ in magistrum, ne domui et scholaribus dispendium aliquod inferat longa mora; and one of the persons returned being a fellow of the college, and the other a member of a different college, omitting Mr. *Longmire* who was the third candidate; the bishop cannot on that account declare the election made by the fellows to be null, and appoint another than one of the two returned to him to be master, as claiming by lapse under a provision in the statutes, which declared that, in default of appointment by the fellows within a certain time, the bishop should nominate to the mastership. *ib.*
3. And therefore the Court in such case, on the bishop's refusal, granted a *mandamus* to him to appoint one of the two persons presented to him by the fellows. *ib.*
4. In general the Court of *B. R.* will not interfere in the case of a visitor, or review any determination made by him in that capacity: but this was held not to be a case within the bishop's general visitatorial power, his right being restrained to the selection of one of the two persons presented to him by the fellows, who were the judges of their fitness. *ib.*
5. Nor could the appointment of the bishop be said to have been done by virtue of his visitatorial power in this instance, even sup-

posing the case to have been within his general jurisdiction, because he did not cite or hear the parties, and it is a judicial act; and unless there be a general visitation of the college, there must be an appeal to the visitor, and he should proceed on that. *P.* 290

6. Where by the statutes of a college the right of appointment to the mastership devolves on a person named, who is also general visitor, on neglect of the fellows to elect, such nominee has not that right as visitor but by the special appointment of the founder. *ib.*
7. Then as this was not a visitatorial act, the propriety of the election and the bishop's conduct cannot be inquired into by himself as visitor, because that would be to determine on his own right, for he claims an interest and asserts a right, and a visitor cannot be a judge in his own cause, unless that power be expressly given to him; and in all these cases the power of deciding the question, and construing the statutes, devolves on the courts of law. *ib.*
8. Where by the constitution of *Exeter* college, *Oxford*, the bishop of *Exeter* was appointed general visitor, to visit by himself or his commissary, once in 5 years *ex officio* unless oftener required by the college; and it was provided that he might deprive the rector or expel the scholars, with this qualification, *si tamen ad deprivationem rectoris, aut expulsionem scholaris alicujus, per episcopum aut ejus commissarium agatur*, then if he cannot make out his innocence he shall be removed without further appeal, *dum tamen ad ejus expulsionem* there shall be the consent of the seven senior fellows: and that if the rector be removed by the bishop's commissary, *etiam consentientibus* four of the senior fellows, he may appeal to the bishop; if the bishop deprive the rector without the consent of the four senior fellows, such deprivation is good notwithstanding, for being general visitor he has the power of deprivation necessarily incident to his office, and it can only be abridged by express words, of which there are none here; for the words *si tamen*, &c. *dum tamen ad ejus expulsionem*, &c. relate to



## INDEX TO THE PRINCIPAL MATTERS.

to the fellows and not to the rector; though the words *etiam consentientibus, &c.* do qualify the commissary's power, but not the bishop's *Per Holt in Philips v. Bury.*

Page 346

9. But if the consent of the four-senior fellows had been necessary to the deprivation of the rector, it would not have been sufficient for the bishop, having first suspended some of the senior fellows, to have obtained the consent of the rest; for the suspension made no vacancy of their offices, but was only an impediment to their enjoying any benefit from them. *ib.*

10. Under this constitution of the college the visitor can only visit once in 5 years, unless called upon oftener by the college; and if he come uncalled within the five years, his visitation would be void, and any sentence he might give a mere nullity, as *coram non iudice.* *ib.*

11. But if a member of the college, expelled by the rector and fellows, appeal to the bishop as visitor, and the bishop appoint a particular commissary to examine the matter, this is not such a visitation as precludes the bishop from visiting again within five years *ex officio*; for as visitor he has a constant standing authority at all times to hear and redress the grievances of the particular members. *ib.*

12. So where the bishop appointed a visitation to be held in the chapel on the 16th *June*, and the rector and fellows refused to open the doors on the day appointed, but protested in the area, and the visitor called over all their names, and swore a person to prove the summons, and went away without doing any more; and afterwards he appointed another visitation in the hall on the 24th *July* following, and called over the names, and registered the act of 16th *June*, notwithstanding a protest against all the proceedings, this visitation is good, and what passed on the 16th *June* was no visitation. *ib.*

13. The visitatorial power is an appointment of law, and is not of ecclesiastical origin: where the interest of a charity is vested by the donor in trustees, there the law does not raise a visitor; but where they who are to have the benefit of the charity are incor-

porated, there the law raises a visitatorial power in the founder and his heirs, unless the founder hath appointed some other person. *Page ib.*

14. And there is no difference in respect of the visitatorial power between a college and an hospital, where the latter is not governed by trustees. Both are eleemosynary: and a college imports a corporation. *ib.*

15. Spiritual corporations are visited by the ordinary. If he is visitor, as ordinary, an appeal lies to his superior; if patron, no appeal lies. *ib.*

16. Where a visitor has power to deprive, his sentence is not examinable either as to the cause, or the truth of the fact, in a court of law. So that if a deprivation be pleaded, there is no occasion to shew the cause; nor is it traversable even in a visitation. *ib.*

17. Though the statutes of the college enumerate several offences for which the rector shall be deprived, and contumacy is not one of them, yet that doth not tend to abridge the visitor's power of deprivation incident to his office during a visitation, but he may equally deprive for contumacy. *ib.*

18. A mandamus lies to a visitor to hear an appeal, and give some judgment. *R. v. Bishop of Lincoln.* 338. n.

U.

U M P I R E.

See ARBITRATOR.

VOID AND VOIDABLE.

See ANNUITY, No. 2. ASSUMPSIT, No. 14, 15, 16. BILL OF SALE, No. 3. RECTOR, No. 3.

U S E.

See TRUST, No. 2.

U S U R Y.

See INTEREST. AMENDMENT.

1. A., by deed executed in *London*, for securing the repayment of money lent to B., is appointed receiver of B.'s rents in *Middlesex*, with a pretended salary which enables him to retain usurious interest; he





## INDEX TO THE PRINCIPAL MATTERS.

accordingly receives the rents in *Middlesex*, but settles the account in *London*, and there pays the balance on which the usurious interest is allowed; the offence is completed in *London*, and the *venue* in a *qui tam* action for the penalty is properly laid there. *Scott & T. v. Brest.* Page 238

### W.

#### W A G E R.

See EVIDENCE, No. 9.

1. A wager respecting the amount of any branch of the public revenue is illegal, because it leads to an improper discussion, and is contrary to sound policy. *Atherfold v. Beard.* 610
2. And after verdict for the plaintiff in an action brought on such a wager, the Court will arrest the judgment. *ib.*
3. Mr. Justice Buller was strongly inclined to think, that the stat. 14 Geo. 3. c. 48. made all wagers void wherein the parties had no interest. *ib.* 616

### W A L E S.

See VENIRE DE NOVO.

#### W A R R A N T.

See JUSTICE OF PEACE, No. 4.

1. The practice of one magistrate granting a superseas to the warrant of another without any formal and legal examination is unwarrantable. *The King v. R. Brooke.* 190
2. Although it be not necessary to state on a warrant of commitment on a charge of felony that the act was done *feloniously*; yet unless it sufficiently appear to the Court that a felony has been committed they are bound to bail the defendant. *The King v. Judd.* 255
3. Setting fire to a parcel of unthreshed wheat is not a felony within 9 Geo. 1. c. 22. *ib.*

#### W A R R A N T Y.

1. If a horse sold at a public auction be warranted sound and 6 years old, and it be one of the conditions of sale that he shall be deemed sound unless returned in 2 days, this condition applies only to the warranty of soundness. *Buchanan v. Parnshaw.* 745
2. Therefore where a horse sold with such a warranty was discovered to be 12 years old

ten days after the sale, and was then offered to the seller who refused to take him, it was holden that an action might be maintained by the buyer against the seller, and his right to recover is not affected by his having sold the horse after offering him to the defendant. *Page ib.*

### W A S T E S.

See COPYHOLD, No. 2, 3. MANOR, No. 1.

### W A V E R.

See LANDLORD AND TENANT, No. 5.

### W A Y - L E A V E.

See RATE, No. 1, 2.

### W I L L.

See DEVISE, FEME COVERT, POWER.

### W I N E L I C E N C E.

See EXCISE.

### W I T N E S S.

See EVIDENCE.

1. Husband and wife shall not be called in any case to give evidence, even tending to criminate each other. *The King v. The Inhabitants of Cliviger.* 263
2. In a case of settlement where a marriage in fact had been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shews him to have been guilty of bigamy. *ib.*
3. Husband and wife may prove their own marriage on a question of settlement. *ib.*
4. In a *qui tam* action on the statute of usury against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or repaid the money; notwithstanding he is ready to release to his assignees all benefit which may arise from the discharge of this debt in particular and all claim to allowance and surplus in general; and notwithstanding the assignee has proved his demand for the money lent under the commission. *Masters. Qui Tam v. Drayton.* 496

### W O M E N.

See OVERSEERS, No. 1.

F I N I S.

